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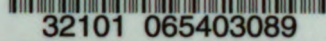
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THE

MONTHLY LAW REPORTER.

MAY, 1854.

TRIAL OF ADELINE PHELPS, *alias* BASS, FOR THE MURDER
OF HER FATHER, ELIHU PHELPS.

THIS trial, which presented some points of peculiar interest, commenced at Greenfield, Franklin County, Massachusetts, on the 27th of December, 1853, before Judges DEWEY, METCALF, and THOMAS, of the Supreme Court of that State. The indictment charged the defendant with causing the death of one Elihu Phelps, at Northfield, in said county, by mingling a large quantity of deadly poison, the nature and quantity of which to the grand jury were unknown, with his food and drink.

William G. Bates, District-Attorney for the Western District, appeared for the government. He stated to the court that the Attorney-General, Mr. Choate, would be unable to attend the trial; and on his motion, and no objection being made by the counsel for the defence, *Charles Devens, Jr.*, was admitted to aid in the prosecution.

George T. Davis and *Charles Allen*, appeared as counsel for the prisoner.

The case for the prosecution was opened by Mr. Devens, who stated that the evidence relied upon by the government would be circumstantial. It would appear that the accused, who was about forty years of age, had been living in the town of Northfield, with her father and mother, who were very old and very poor, the father being eighty-three years old, and both supported by the town; that not long

before his death, the old man had conveyed the little property on which he lived, worth one or two hundred dollars, to the town of Northfield, with the view of having the proceeds applied to the support of himself and his wife ; that the accused had claimed an interest in the property thus conveyed, and both on that and other accounts had used violent threats and personal violence against her father ; that some two months before the alleged poisoning, she had caused two ounces of corrosive sublimate to be bought, some portion of which had been found in her clothing after her father's death ; that in November, 1852, her father became sick, and so continued till his death, about three weeks afterwards, with symptoms which could not be accounted for except on the supposition that a mercurial poison had been administered ; that she herself attributed his death to poison, but claimed that it had been administered by the neighbors ; and that other circumstances would be shown, tending to prove the death by poison, and her guilty connection with the fact.

The first witness called by the government was *Elijah Stratton*, a physician of Northfield, who saw the deceased once during his sickness, November 15, 1852, at the request of the son of the deceased, Hubbard Phelps. He noticed a general swelling of the cheek ; mouth very much inflamed, as well as gums, cheek, and fauces ; the tongue swollen somewhat, though not very badly ; extensive ulcerations on sides of cheek, down on gums, on side of molar teeth, into the throat ; constant flow of saliva ; druling ; mouth so sore he could not spit ; he said he had distress at his stomach and in his bowels the night previous, with severe diarrhœa ; trouble in micturition ; urine high-colored and scanty ; prostration ; pulse small and feeble ; very great fetor of breath, severe, peculiar ; did not notice respiration or condition of skin ; great difficulty in swallowing.

Adeline was present with the old man. I said it was a severe case, and evidently there must be some cause for it. She said she thought so too ; she had no doubt in her mind the old man had been poisoned, by eating milk from one of the neighbors, Arad Webster. She said the milk affected the cat and the old man alike : that she heard an outcry in the night, made by the cat, and before she could get her out the cat had made bad work on the floor ; and before she could get back, the old man was in the same

condition. Hubbard Phelps, her brother, was present at this conversation; he spoke very severely, and she replied in the same way. He said she had poisoned her father; had threatened it a long time, and now had done it. She said he would have to answer for such charges; that she had been doing all she could to make the old folks comfortable, and did not like to be abused. The symptoms which I observed were caused, I think, by some form of mercury; the most severe case I ever saw. There was a terrible distressed sinking of the stomach, he said; that would be the effect of mercury in certain quantities; he had some medicine there, which appeared to be balsam and sweet spirits of nitre; corrosive sublimate is a chloride of mercury.

On cross-examination the witness said the expectoration might be three pints to two quarts in twenty-four hours; the deceased had been an old palsied man for a number of years; no such salivation could be produced but by mercury; know of no distinct disease of salivation; there could be no salivation without mercury, nor by disease of the salivary glands; perhaps there might be iodine, because there are iodines of mercury; there could be no salivation which I could not distinguish from mercurial salivation; I am not sure that I could distinguish the mercurial fetor from any other; there is such a disease as *cancrum oris*, accompanied by fetor; I could not tell the fetor of quinsy from that of mercury; sore mouth might arise from other causes than mercury; I can't say but that each symptom I have described might exist without mercurial cause; arsenic would not cause all these appearances; I have always thought so; I don't recollect ever attributing these appearances to arsenic; I recommended no treatment for poisoning; albumen and gluten good antidotes to corrosive sublimate; albumen acts mechanically, by guarding approach to stomach; does not act by chemical affinities that I know of; when I saw him he was in secondary stages; I never saw him afterwards; post mortem examination might have been useful; it would have revealed more or less of inflammation; I think poisonous doses would leave noticeable traces; there might have been other causes of death of which I know nothing; perhaps it is a received opinion among medical men that symptoms are not a sufficient basis of judgment in such a case; they ought not to be sufficient.

Marshall S. Mead, a physician of Northfield, was called to visit the deceased November 13th, and continued his visits till his death on the 26th. He confirmed Dr. Stratton's statements as to symptoms; deceased had used the catheter for years; witness applied it for him the last week of his life; evidently ulceration connected with the bladder the last few days; pus often discovered in the catheter during that time; he gradually lost appetite and strength; declined and died; died I think of the constitutional effects of mercury taken into the system; nothing but mercury could have produced this combination of symptoms; corrosive sublimate in small doses might have produced them; I would rely on no one symptom, but would on the combination. On cross-examination he said, "I did not at first suppose he was poisoned; I think not more than ten, fifteen, or twenty grains of sublimate could be taken at any one time without causing death; sublimate often used as medicine; basis of some quack medicines; one-quarter to one-eighth of a grain is a dose; exceedingly acrid in taste; used for bed-bug poison; albumen a common antidote; acts by defending the coats of the stomach; not chemically so far as I know; this was the worst sore mouth I ever saw; if given here, the poison was in very small quantities; saw no evidence of lesion of stomach or bowels; there should have been a post mortem examination if the effects were recent; in case of active poison symptoms merely ought not to be relied on; the other attending physician thought no further evidence could be gained from the body. Have known accused for years; been brought up in Northfield; a seamstress; married years ago. I told the Grand Jury I thought she was insane."

Hubbard Phelps. Father eighty-three when he died; mother was then eighty-six; Adeline born in 1811; father began to complain November 9th or 10th; I lived twenty-five rods off, at George Fisher's house; Friday night Adeline soaked a cracker for him; next morning, Saturday, November 13th, he came to Fisher's while they were at breakfast; breath so bad that I told him he had better stand back; I made a wash for his mouth Saturday night, and left it in a tea-saucer; I measured the quantity with a stick, and made a mark; next morning measured again, and there was more by about one-thirtieth of an inch; Drs. Stratton and Mead came on Monday, but not together; Adeline asked how

mercurial poisons operated on men and women, and they talked a good deal about it; Friday or Saturday before father was taken sick, he called me in there; Adeline there; Adeline wanted to know why the hell he would wake her up; she said it was nothing but a damned fuss, and she would not have him round; she would give him something that would make him blind or bed-ridden, or would kill him; I told her this would hurt her some day; she said she was afraid of nothing but God and the devil. In February or March, 1852, there was another quarrel; father said she had ripped a feather bed open, and taken out some feathers which he would not let her take away; she had a flat-iron in a cloth; she threatened to knock his brains out; the flat-iron dropped; he then went to get his jug and long cork for me to get some molasses for him from the store; she was mopping; she pushed him from the cupboard; she catch'd a butcher knife and swore she'd stab him if he moved another step, by God; I told her to lay down the knife; she refused by God to lay down the knife; I took her out of the house; she bit one of my fingers to the bone with her single front tooth, but I didn't mind it. In April, 1852, I heard father calling Hubbard, and went in and she had father by the hair of his head holding him down; I pulled away her hands and a lock of father's hair with them; father said he'd go up to Capt. Colton's and get a warrant; she said he might get what warrant he wanted, but she'd be damned but she'd have her part of the place; afterwards father came in and sat down and cried; that same afternoon she got in while the old gentleman was milking, she got in and fastened the door, and the old gentleman had to pry it open with a crowbar; they never ate together after November 1st; he ate in one room, and she and her mother in another; after father was sick, he told her she must have given him poison, and she denied it; once after father was sick, there was a pumpkin pie on the table; the old gentleman was at table; mother took piece of pie and was going to eat it; Adeline took it away and said she should not eat the poison pie made from Webster's milk; another time mother was going to get some water to drink in a dipper which father had had by his bed; Adeline said mother should not drink from the poison nasty thing that father had had to his mouth all night; father could not spit; could hardly speak; driled;

if he swallowed, it would run back through his nose ; I found a little corrosive sublimate in paper, in the pocket of one of Adeline's dresses, after she was arrested. A day or two before the sickness she said, "to-day or to-morrow will tell the story, or will fix you."

Luke A. Darling swore that in the latter part of August, 1852, at Adeline's request, he got twenty-five cents' worth of corrosive sublimate, two ounces, at Woodward's store in Northfield ; she said she wanted it to kill bed-bugs with ; he handed it to her, and told her Woodward said it was a deadly poison, and she must be careful of it. This witness, being cross-examined by Adeline, added that when she requested him to get the sublimate, she also asked him not to say whom it was for.

Samuel D. Woodward confirmed Darling's statement ; sublimate commonly purchased for bed-bug poison, but unusual to sell more than an ounce.

George H. Phelps, a son of Hubbard Phelps, brought the old gentleman some clothing a few days before he died ; Adeline said the old gentleman was old, with one foot in the grave, and would not need the clothing.

Samuel B. Williams saw deceased the day he died ; tongue very much swollen ; mouth of dark purple color ; did not notice breath particularly.

George Fisher, heard defendant speak of the place where they lived ; said the property was her's, and by God she would get rid of the old man and take care of her mother ; cursed the old man for deeding it away ; saw deceased almost every day while sick ; did not have off his clothes for a fortnight before his death ; saw him sitting in his bed and leaning his chin on his cane, and the drule roped down from his mouth to the floor ; mouth perfectly raw, and tongue swelled ; almost impossible to stand over or help him ; very bad scent ; same appearances after death ; have heretofore heard defendant speak of Arad Webster's milk and Billings' water being poisoned ; she once came to get a jug which she had borrowed from us, and said she wanted to send out of town and get milk not poisoned ; all the neighbors' milk was poisoned ; in July or August, 1852, witness' pig died apparently from poison ; Adeline came over and sat down on the head of trough, and advised to have his stomach opened ; it was opened, and the lining of the stomach was found to be off, but no poison was found.

Mrs. Polly Fisher. Adeline told me her father had no right to deed the place, for it belonged to her; said she would never eat with him again; would not bury him if he were to die; one night that fall I was in there and she borrowed a square, for she said Mr. Billings had stolen her measure, and somebody else had stolen the mainspring to her watch; I told her it was no such thing; she said Mr. Billings had stolen John Carlton's handkerchief for a snuff-rag; she said the water was poisoned, and she would "shoot Mr. Billings, by God, if I die twenty deaths for it; if any thing is done, it will all be laid to me; but I don't care for that, it will all go under insane;" she said all the milk from all the neighbors was poisoned; at another time when I let her have some milk she said she was not afraid to use this milk, for I did not know she was coming in; she also told me that the cellar of her house was full of dead men's bones.

Charles H. Stedman. Physician, twelve years in charge of U. S. Marine Hospital at Chelsea; nine years, city institution at South Boston. The symptoms testified to, indicate an acrid substance taken into mouth and stomach; I think mercurial; my opinion is quite strong; I think I am fully convinced; salivation and fetor are peculiar to mercury; suddenness of development of symptoms confirms suspicion; I think on all the symptoms it was corrosive sublimate; immediate cause of death, exhaustion; nothing else but mercury will produce these results; I have known salivation from other causes, but milder; chemical analysis would have discovered the poison if there; corrosive sublimate is an antiseptic; used to preserve specimens; I can't say that I doubt on the symptoms; but my mind may have been biased by the testimony; I see no evidence thus far of insanity; nothing beyond want of proper education, and bad mental constitution, perhaps inherited; there is nothing unusual in her eye, or manner; her cross-examinations of witnesses thus far have not indicated insanity; even when there are delusions, there may still be the power to discriminate between right and wrong.

Isabella Murphy. In fall or summer of 1852, two weeks before old gentleman fell sick, Adeline said he had no right to deed the place away, and she would be willing to go to hell to see him burning in it.

Samuel S. Holton — Overseer of the poor; the old gentleman deeded his property to Northfield, December 6,

1851; appraised at \$157; property belonged to him; after the death Adeline repeatedly claimed as matter of right that the body should be examined.

Simeon A. Field corroborated the previous witness.

William H. Rockwell. Physician, twenty-five years, of Brateleboro'; symptoms indicate some mercurial preparation as the most probable cause; there may be other causes, but there is a very strong probability that it was mercury; there should have been a post mortem examination; albumen acts as an antidote by chemical combination; quack medicines often contain corrosive sublimate; other disorders may have supervened.

Cross-examined. Have been seventeen years in charge of lunatic asylum at Brattleboro'; have three hundred and seventy patients under my charge; defendant was brought there in 1844 by town officers of Northfield; remained till May, 1845; returned again in 1847, of her own accord, and staid eleven days, until I directed her to leave, there being no provision for her support; she said there was a conspiracy against her life; she was and is insane; no doubt whatever; no doubt of the existence of her delusions; hallucinations and delusions make up insanity; I treated and prescribed for her as an insane person; she could see the difference between right and wrong in the abstract, as many insane persons do, but not in her own case; coherence and sagacity often exhibited by the insane; have talked with her twice since; same leading idea of conspiracy; she thinks she is not insane; part of the alleged conspiracy is to make her out insane; I have never seen her when sane; impelled as other insane persons are; perhaps all vice is insanity; sometimes insane persons try to avoid detection; her belief in subterranean passages, and bones in cellar, connected with her delusions; to ascertain whether the act is to be excused by insanity, we must know whether the delusion connects itself with the act; her delusion as to the ownership of property seems to have such connection; this is a case where the mass of men would say there was more of ugliness than of insanity.

The prisoner inquired, among other things, if she had not repeatedly demanded that he should open the doors and let her out; and Dr. Rockwell replied, that he had no doubt of it, and that such requests were very common among the patients at his institution.

The evidence for the prosecution here closed. One of

the newspapers which reported the trial, gives the following sketch of the scene.

"A number of ladies have been in attendance, and this afternoon the gallery was crowded. One was successfully uniting the pursuits of law and needle-work. The solemnity of a capital trial has been relieved by several very amusing circumstances, and even the gravity of the Bench has been hardly sufficient to preserve a due degree of solemnity. No one has seemed to enjoy the proceedings more than the prisoner. Her cross-examinations of several witnesses took a pretty wide range, and she argued some with the court the admissibility of evidence. She put some questions with a skill that would have done credit to a lawyer."

DEFENCE.

Mr. *Charles Allen*, in opening for the defence, took the ground that it was necessary for the government to establish the *corpus delicti* by evidence independent of that tending to implicate any individual; citing 3 Greenl. Ev. § 131; Webster's Trial, p. 473, and other authorities; that threats, possession of the means of crime, by any individual, should not be considered at all in determining this question; that symptoms could not be considered the best evidence of poisoning, or evidence on which it would be in any case safe to convict, especially when a post-mortem examination was possible, and was neglected. He undertook to read from various medical works in support of these views, from Taylor on Poisoning, from Dunglison's article in the Amer. Cyclop. of Practical Medicine, from Dean's Med. Jurisp., and others, but was stopped by the court, his Honor, Judge Dewey saying that the rule had been changed since the trial of Rogers, and that the court, upon full consultation, had decided to exclude all medical books. He also remarked upon the nature of circumstantial evidence, citing 3 Greenl. Ev. § 134, and upon the burden of proof, citing 3 Ib. § 29, and Webster's Trial, page 470.

In case the jury should be forced to believe that Elihu Phelps died from poison, administered by the defendant, then it would be for them to consider, upon the evidence which would be introduced, whether she was of sound mind.

EVIDENCE FOR THE DEFENCE.

Hon. *James White*, of Northfield, testified that he had noticed peculiarities in Adeline's conduct before she went to Brattleboro'; that on one occasion she dressed herself in men's clothing; and on another she walked back and for-

ward on top of a fence, uncovered, while it was raining hard ; and, upon being taken into the house, threatened to kill the witness with a butcher-knife. He also had heard her speak of conspiracies against her.

Medad Alexander, of Northfield, knew of her being dressed in men's clothing ; had heard her complain that the water and milk at her house were poisoned by the neighbors. She claimed to own the place where she lived. This conversation was in her father's presence, and the old man said that she would not talk in that way if she were not deranged.

(At this point, the prisoner, who was obviously much disturbed by the line of defence adopted by her counsel, called upon them to close the case, let the judgment be what it might, unless they could bring on better evidence. She had previously reproached her counsel for not taking pattern by what she considered the very handsome course of the counsel for the government, in not making any attempt to prove her insanity.)

Samuel H. Reed, sheriff of Franklin County, testified that since being in prison on this charge, she had made complaints to him ; on one occasion she said that a gun had been fired, the report of which she heard, and the ball came through the jail window, and was picked up by the jailer : that the jailer was intending to take her life, and had attempted to poison her, and she would never take food of him again ; and that there was a conspiracy to get rid of her.

On cross-examination he said he could not speak of any very bad conduct on her part except abusive and vulgar language to himself and the jailer, and threats to kill the jailer.

Seth C. Smith, jailer, testified that she told him she had been shot at, and the glass was broken ; he took a bullet out of his pocket and she said it was the same one ; she complained that he was influenced by the former jailer, and by Northfield villains, to poison her ; she abstained from food twelve days at one time ; and another, a week ; and, a third time, fifteen days.

On cross-examination, the witness said he mistrusted she got food from other prisoners ; and that, at times, she was violent in her conduct.

The prisoner cross-examined him with great closeness, with the view of having him admit that her food was

poisoned, that she had actually been shot at, that the other prisoners heard the gun, and that he had actually picked up the bullet. The witness expressed the most entire ignorance on all these points, and when he went from the stand, a scene took place which is thus described by the reporter of the "Springfield Republican."

"Here Adeline could no longer restrain her indignation at the bad taste displayed by her counsel in selecting evidence. She called upon the Court to dismiss her counsel, and declared she would rather plead guilty when she was innocent than have such falsehoods told of her. The counsel were somewhat embarrassed by this 'fire in the rear,' but the Court came to their support, and assured Adeline that she had very able and faithful counsel. She knew that, but she could not stand such evidence as they brought forward."

Hannah White, wife of James White, a previous witness, on one occasion, ten years ago, went to see Adeline, by request of Adeline's father, when Adeline showed her a bottle, saying that she didn't know what it contained or where it came from, and that her mother would be better off if she went away than if she stayed at home (giving the witness to understand that her father would poison the family.) At another time, Adeline was afraid to enter the house of the witness, and when approached, raised her hands saying "Oh don't grab me." She also testified to complaints by the defendant of attempts to poison.

Arad Webster, of Northfield, had heard her speak of attempts to murder her, of there being a passage under her house, and of her hearing people talking and running about the house; one time she was sitting up in an apple tree, complaining bitterly. He also spoke of various other apprehensions showed by her at different times, which seemed real to the witness.

Richard Colton, the magistrate before whom the preliminary examination was had, testified, that Dr. Stratton then stated, that the appearances were those of mercury, or might be of arsenic, and he couldn't say for a certainty which.

Lucy Webster, wife of Arad Webster, had heard her speak of conspiracies against her; of an under ground tunnel leading to her house, in which bloody deeds were carried on, of hearing voices when no voices were to be heard, and of being afraid to use the milk her father milked, because it

made her mother sick ; she frequently expressed fears for her life.

Dr. David T. Brown, of the Bloomingdale Asylum, New York, saw her a few days previous to the trial, at the jail, and considered her insane. She exhibited delusions and hallucinations ; spoke of a conspiracy ; believed it embraced parties connected with the jail ; declared that attempts had been made to take her life while in jail, by poisoning her food, some of which she had retained, intending to have it analyzed, and that her enemies intended, if she was not convicted, to prove her insanity, in order to get her confined in a lunatic asylum. She said there was a passage to her building, either made or used by her enemies to annoy her ; that her milk and water were poisoned. He noticed nothing leading him to doubt that her delusions were real ; and they appeared to him to have extended over a period of many years, and to be permanent ; she spoke of hearing voices at certain times ; at one time, in a shed adjoining, one said, if they were going to kill her, they had better have it done at once ; Capt. White said it should not be done on his premises ; some one replied that he was a d—d old fool. Some one suggested that they should kill her, and place her so as to leave a suspicion of suicide ; hearing which, she rubbed her dress against fresh paint, believing that the paint would show that she came to her death by violence. To him her general appearance seemed consistent with the supposition of insanity. If called to a patient in the situation of Elihu Phelps, as described, he would suppose some preparation of mercury had been taken, but would not feel authorized to pronounce a positive opinion. His opinion would be that mercury had been taken, though the symptoms alone would not be conclusive evidence. Salivation is not necessarily from mercury ; he had seen it, from other causes ; from fractured jaw, from the use of other medicines, tin, bismuth, &c., from carious teeth, and he mentioned an instance of a case of salivation, continuing for two years, without any obvious cause. In his case, death might have arisen from the bladder difficulty mentioned.

On cross-examination, he defined poison as a substance which is capable of destroying life without acting mechanically (following Dr. Guy's definition.) He had seen one case of poisoning by corrosive sublimate, and described the symptoms ; he repeated that he was not fully satisfied that

Phelps had taken mercury, although strongly of that opinion.

Dr. James Deane, of Greenfield, a physician twenty-three years, did not think the evidence conclusive, though it raised a strong presumption, that the death was caused by mercury. The disease of the urinary organs might have a strong effect in causing death. From the appearances there was undoubtedly suppuration; and with old men death often results from abscess of the prostate gland. He had seen a similar case within a few days which he thought would soon terminate fatally. Salivation and fœtor are both found in cases where mercury has not been used. A post mortem examination he thought indispensable. There is no difficulty in chemically ascertaining the presence of mercury, to the one hundredth part of a grain. A poisonous dose of corrosive sublimate could not be swallowed, without being recognized in a moment. Albumen has a strong affinity for corrosive sublimate, and acts as an antidote by forming an insoluble compound with it, in the stomach, destroying its virulence, and preventing it from forming an affinity with and decomposing the animal tissues. He exhibited a grain of corrosive sublimate, saying that there was no difficulty in recognizing the effects of a single grain, though that was not enough to destroy life. He also described the symptoms of mercury, mentioning a deep blue line round the gums as one. He had seen *Adeline* often in jail. She labored under intense delusions, supposed herself the object of a conspiracy, heard imaginary conversations, and was in a state of high mental excitement. She had fear of being poisoned by the jailer, and would not take her food, unless he brought it. He could not doubt that her apprehensions were real; and had no doubt whatever of a state of confirmed insanity.

On cross-examination, he said, that there are diseases which would produce all the symptoms of *Elihu Phelps*, and he could not have been satisfied without a very thorough examination. And if the examination developed no other facts, then he should believe it the effect of mercury, and, perhaps, could not doubt it. He might be aided in forming an opinion by symptoms which afterwards he would not recollect. Fracture of the lower jaw might produce the same train and combination of symptoms; he knew no single disease or drug that would produce them all. There

might be two concurring diseases, as salivation and colic, that would.

Dr. Deane, as well as most of the other witnesses for the defence, was closely re-examined by the prisoner. The following is a specimen of the closeness of her examination, made smilingly, and with a very musical voice, but with a pronunciation of names which indicated that her information was from books rather than conversation :

Prisoner. I would ask you, Dr. Deane, if Orfilo is not the greatest French authority on poisons ?

Dr. Deane. I do not know any greater.

Prisoner. Is not Christison a great English authority ?

Dr. Deane. I think him very reliable.

Prisoner. Now I want to know if John Hunter was not the greatest authority of his day on these subjects ?

Dr. Deane. Undoubtedly he was the highest authority of his time.

Prisoner. Now I want to know if all three of these authorities do not concur in saying that it is unsafe to infer the existence of poison from symptoms only ?

Dr. Deane. I do not remember particularly, Adeline, as to each of these writers, but that undoubtedly is the prevailing opinion among modern writers on the subject of poisons.

Dr. Luther V. Bell, of the McLean Asylum, Somerville, said the symptoms described would afford a very strong presumption of mercury, but not so strong as to shut out the contingency of their occurring from other causes ; even if mercury were received, the evidence is not conclusive that the death was owing to mercury ; the purulent matter, in connection with the fact of his having a disease of long standing, would indicate a severe malady, of which old men often die.

The symptoms do not indicate large doses at any one time — certainly not more than a grain or two.

Undoubtedly the food should be examined, and chemical writers are of opinion that there is no difficulty in detecting the presence of poison. In cases of small doses, gradually taken, perhaps the examination would not disclose the poison ; but it would at least have a tendency to show how far the disease of the prostatic gland had proceeded.

He thought there would be no possible mark of distinction between salivation by corrosive sublimate, and other mercurial preparations. The best writers say, that in cases of poisoning by mercury, there is a particular blue mark

on the gums, as distinguishing it from other salivations. This being wanting, would diminish his confidence.

He had no doubt about Adeline's laboring under delusions for many years past; and considered the fact of delusions as proof of insanity. She seemed to him to be broadly insane; and her delusions broad and palpable, expressing themselves in the same way over a long period of time. He could give no opinion as to lucid intervals, but thought that at about the period when the act was done, she was laboring under insanity.

He did not agree with Dr. Stedman, as to the want of education.

She seemed to couple in her father in the general category of her enemies.

Her acuteness did not change his opinion. He appreciated her intellectual acuteness, but many insane persons show considerable mental power. He did not consider her as governed by sound motives in her conduct to those she thought her enemies. He did not think insane persons were often capable of concealing their insanity very long. He narrated the case of the Brazilian, mentioned in the trial of Rogers. In a sagacious insane person he would draw no inference from the person's wishing not to be called insane.

On cross-examination, he said that he should no doubt have inferred that Elihu Phelps was under the action of some mercurial preparation, and thought the symptoms would arise from no single disease which he was acquainted with. But, in an ordinary case of salivation, the accidental setting-in of a bowel complaint would seem to him to produce a state of things similar to that in this case.

Salivation is not necessarily mercurial.

There is an odor known as mercurial, but it is imitated in cases where no mercury has been taken. In itself he could recognize no difference between mercurial and other fœtor.

Some forms of what is called quinsy, he thought would produce symptoms essentially like these. He regarded the probabilities very strongly in favor of the supposition of mercury, but not so strongly as to preclude the possibility of some other cause. He thought from the accounts in the books, the writers consider the blue line invariable.

He had a strong belief that she was insane. The pre-

sumption was very highly that way. Her cautioning the person who delivered the corrosive sublimate to her, as to concealment, was no evidence either way. Here was a continuous delusion, traced in 1844, 1845, and 1847, and again the last year. His experience led him to suppose it was continuous. Delusion might exist with all the other marks of calculation. In his opinion, she was irresponsible. She seemed to have connected her father somewhat with the conspiracy and with her feelings.

George Chandler, of the State Lunatic Hospital at Worcester, thought her insane, and that she had been so for several years. Her apprehensions of conspiracies, her false hearing, and her general conduct, were decided indications of insanity. She appeared to have some control of her actions, but not that control which a person of healthy mind would have. She had illusions in September. The fact of poisoning is not inconsistent with insanity. The evidence is not conclusive as to mercurial poisoning; it does not shut out all doubt as to other modes of death. The purulent appearance would raise a doubt.

On cross-examination, he said that great control over her mind had been shown during the trial; she conversed well on all points; he would be unwilling to say that she was not laboring under delusion, though there was a chance for supposing that she might have been able to control herself; her father was connected with the conspiracy in her mind. He would have acted upon the supposition of Elihu Phelps having taken mercury, and would have prescribed for that.

Dr. David T. Brown, recalled, mentioned a case within his own observation, where an insane lady poisoned her father.

Dr. Charles M. Duncan, of Shelburne, had not heard all the evidence of symptoms; had seen two cases of salivation without any obvious cause; disease or abscess of the prostate gland is a frequent cause of death; he had known several such cases, and described the symptoms.

The evidence for the defence here closed.

Mr. DAVIS closed the case for the defence; he argued at length that the evidence, though such as to raise a strong probability, was not conclusive of the fact that the death was caused by poison. He referred to the distinction taken in *Greenleaf on Evidence*, vol. 3, p. 29, as to the amount of evidence required to produce a result in civil

as compared with criminal cases; in civil cases a preponderance being sufficient, but in criminal no weight of preponderant evidence being sufficient, unless such as to remove all reasonable doubt. It was conceded that a *post mortem* examination would have furnished the most reliable evidence; the government had chosen to rest its case upon the less reliable evidence, while within ten miles of the place of trial there was a body which, subjected to scientific examination, would at any moment furnish conclusive proof of the existence or non-existence of poison. Poor and imprisoned, his client had no means of going into this inquiry; but with what face could the government ask for a conviction, which had the power and the means to produce the best evidence, but had preferred to rely on what was inferior. In consequence of the course taken by the government, this case was to be tried as if all the discoveries of chemical and medical science for the last two hundred years were unknown or ignored; as if because the district was remote and the alleged criminal poor and unfriended, she might properly be deprived of the aid which the precise results of chemistry render to the legal investigation of such a case. He dwelt upon the consideration that the fact of death by poisoning, if found, was to be found by itself and without the aid of moral conclusions: and upon the further consideration that the scientific evidence produced in behalf of the prisoner, evidence of the highest authority, concurred to the point that symptoms alone were not conclusive.¹ There were specific diseases under which this old man had long suffered — there was also the incurable disease of old age — from any or all of which the death might have occurred without the intervention of external injury.

But if the jury should find that here was satisfactory evidence of death caused by the prisoner, they were then to consider whether death was caused by a responsible agent. If they believed her insane, then all the horror which her language and her acts would at first cause, would change into pity and grief. Friendless, he believed

¹ "Upon general principles, it cannot be doubted that courts of law would require chemical evidence of the poisoning wherever it were obtainable; and it is believed that no modern case of satisfactory conviction can be adduced where there has not been such evidence, or in its absence, the equivalent evidence of confession." *Wills on Circumstantial Evidence*, p. 221.

her to be, beyond all ordinary human friendlessness; for she might well be called most utterly friendless who was unable, through her illusions, to know who her friends were; who believed that her father and neighbors were leagued to kill her; and who at this moment undoubtedly believed that her counsel in his present address to the jury was hired by her enemies to aid in betraying her to an undeserved doom. (It may be remarked that to this last observation, the prisoner, who had been listening with earnest attention, was observed to nod her head and ringlets with the most emphatic assent.)

On this question of insanity he had but a single suggestion to make: the jury had heard accounts of her illusions, extending over many years, and showing that the defence of insanity, so often perhaps improperly resorted to, would occur naturally enough to those who had longest known her. Were these horrors that had so long haunted her, genuine horrors? if genuine, then they would find her insane if they give faith to the opinions of a body of medical gentlemen, whose opinions upon this point would carry as much authority as any medical opinions to be obtained on either side of the Atlantic. In asking that under these circumstances her life might not be taken, he thought not so much of her or of a continuance of her wretched and melancholy existence, as of the boasted civilization to which her conviction and execution upon such evidence would be a blot and a reproach.

MR. BATES, in closing the case for the government, after commenting upon the nature of the offence, its enormity, the form of the indictment, and the degree of proof, in a case of homicide, admitted, that the burden was upon the government to satisfy the minds of the jury, beyond every reasonable doubt, that the deceased died by poison, administered by the defendant. Any evidence, which would satisfy the mind of these facts, would be sufficient, as well whether it came from ignorant and unscientific men, or was sworn to by men of the highest medical attainments. The death was conceded. The means by which it was produced, was a subject of dispute. The jury would be struck with one fact, which was highly important. The deceased, though very old, was a strong, vigorous, healthy man. Suddenly, and at once, without any previous complaint, or without having taken any drug, he exhibited that peculiar combination of symptoms, which no other

known drug but mercury, in some of its forms, would produce. On this subject, there was no diversity of medical testimony. The symptoms were evident to those not of the profession, who had seen frequent appearances of salivation, and the physicians who were called to see him swore that they had no more doubt of his suffering from the effects of mercury, than if they had given it themselves. He lingered for fourteen days without food, and at last died from the constitutional effects, produced upon him by repeated portions of one of the most acrid of the irritating poisons. It had been urged that the government had failed to produce better evidence of the cause of the death, than the evidence of symptoms. But it was proved, that corrosive sublimate was an extremely soluble substance; that the quantity administered was, in its bulk, but a mere atom; that fourteen days had elapsed before the death; and, even, if at that time an examination had been made, it was doubtful whether any of the substance could have been found, or any thing more than additional evidence of extended symptoms. The jury would judge if this was necessary. They could believe that a man died of poison, without an analysis of the contents of the stomach, just as they could believe that General Warren died of a wound, and not of a fit before the ball struck him, though the fact was not verified by a post mortem examination. If his death was the result of poison, did the defendant administer it? On this subject he referred to the degree of evidence which the government was bound to produce. The defendant was a woman, and a daughter; and as the crime, if it was committed by her, was, in its atrocity, unparalleled in heathendom, he conceded that every reasonable doubt should be removed, before he could ask for a conviction. In encountering the presumptions arising from her sex and her relationship, all the evidence of her conduct, in fact the history of her life, so far as it had been developed, was most material for the consideration of the jury. Her repeated and violent assaults, her profane and abusive language, her threats, her mercenary motive, her purchase of the very material by which he died, the manner in which it was procured, her alleged reasons for its purchase, her investigation of the effects of poison upon the poisoned hog, her minute inquiries of the physicians as to its effects upon the human constitution, her devices and representations relative to

the cat, her anxiety to prevent her mother from eating the food prepared for her father, or using the vessel for drink which he had used, and her charge upon her neighbors of having given her poisoned milk, were facts tending strongly to implicate her as the criminal; and, notwithstanding her sex, and her relationship, if instead of the usual feeling of a child towards a parent,—instead of the tender affection of a daughter, or even the usual kindness of a female, the jury should see exhibited in her a life of violence, a breast of passion, and a heart of malice, they would naturally expect from her that deed of worse than blood, which a female fury, whose love was turned to hatred, would be the first to commit. He conceded that the *corpus delicti* must be incontrovertibly proved; but, he contended, that when the death was proved, and there was evidence tending strongly to show that it was caused by poison, her conduct, her threats, her purchase of the corrosive sublimate, and all the facts tending to show her guilt, were also evidence bearing upon and strengthening the evidence that he died by poison. Unless this were so, many cases might be supposed, where a murderer could escape, and he referred to the case of Dr. Webster, and other cases, as sustaining his views. On the subject of her insanity, he said, he had little to say. The books speak of it as a defence, in cases of poisoning, almost as an impossible defence, inasmuch as it requires that deliberation, contrivance, and that knowledge of the distinctions between right and wrong, which are at war with the idea of a moral and legal unaccountability. In the case on trial, the evidence was peculiarly strong against that defence. Her appearance before the jury, the coolness and skill of her cross-examination of witnesses, all tended to corroborate the testimony of the witnesses, and to show that she had not only the unshrinking hand and the determined will, but also the diabolical skill to perform the deed, with as judicious regard to the means of concealment, as was ever exhibited by a person of the clearest reason.

It would not become him, in the face of the medical evidence, to claim that she had not been subject, at times, to mental hallucinations; but how far it was insanity, in the proper sense of that term, which is a legal excuse for crime, or that other state of mind, which has been honored, improperly as he thought, with the name of moral in-

sanity, was worthy of consideration. The jury ought to place great reliance upon the medical testimony. He respected those witnesses, as men of candor and talent. He appreciated the progress of modern science, though he had no great respect for that science which led a witness to doubt that potions of a most acrid poison, administered in chronic doses, producing a most excessive salivation of an old man of eighty-three years, and preventing him from the use of solid food, and his accustomed sleep, for the space of fourteen days, was the cause of, or had contributed to his death. The jury would remark upon the cautious testimony of Dr. Bell, as to the connection between the hallucinations of the defendant, and the crime. In order to acquit, the disease must have been upon her at the time of the act; and more than that, there must be the proof that the act was the result of the hallucination. The physicians do not point out the connection between the disease and the act. They see that she regarded him as one of her enemies, but they do not see any evidence of an apprehension of danger, or any delusion which would naturally lead to the act. The case was with the jury. The government did not wish an unauthorized conviction; but if she had, in fact, committed this act, the improvements of modern science did not require that she should be turned loose upon the community.

The prisoner had listened with profound attention to the remarks of counsel on both sides, only once attempting to interrupt the District Attorney, who with his accustomed *bonhomie*, said, "Wait a little, Adeline, and you shall have your chance presently." Upon this assurance she remained quiet. She had taken occasion during the trial to approve the gentlemanly course of the government in abstaining, as she said, from "trying to make her out insane," and had taken her own counsel to task for not imitating the government in that respect. After the closing argument for the prosecution, being asked whether she had any thing to say before the case should be given to the jury, she made an address, of which a brief abstract is annexed, taken from one of the newspapers which reported the trial. It is to be regretted that a verbatim report was not made of this very remarkable address. It was delivered with great self-possession, with a clear and agreeable voice, the speaker obviously giving a part of it from memory, and other parts extempore. Some of the phrases

were apparently from books; as, for instance, when she informed the jury that "the daughter of the deceased gentleman" was now before them on trial. At another time, when about to comment on a particular fact, she checked herself, and inquired of her counsel, "Was evidence of that fact allowed to be given?" The counsel said that it had been ruled out. "Then," said the prisoner, "I have nothing to say on that point, as I have no right to comment on evidence not before the jury." It was observed that she did not put her defence on the ground of innocence, but rather on the insufficiency of the evidence to show her guilt. It is safe to say, that the prevailing sentiment among all who heard her, was astonishment at the self-possession, the clearness, and the logical force with which her arguments were put, and the facility with which her thoughts seemed to clothe themselves in appropriate language. It is believed that she received no assistance whatever in the preparation of her address, other than what she might have derived from general conversations as to her case, and from a book of criminal trials, including the Donellan and the Chapman trials, which while in prison she had studied with great care.

The following abstract of her remarks is taken from the Springfield Republican.

"May it please your Honors, and Gentlemen of the Jury :

The prisoner at the bar is before you to be tried for her life. She is charged with the crime of murder, and it is for you to determine whether or not she is guilty. What constitutes this crime? (Here the prisoner laid down the law of murder very correctly, defining it as the killing with malice aforethought, and illustrating her position by examples, and then proceeded.) The fact that the crime has been committed must be established beyond a doubt. If the prisoner had opportunities to commit the crime, this is nothing. If she had motives, it is of no consequence. It is the right and duty of the government to prove that the crime has been committed beyond a doubt. So long as there is a doubt, there is no moral certainty.

The most important evidence of poison is by chemical analysis. Has the government produced even the result of a *post mortem* examination? Where life is depending, we ought to have the opinions of distinguished medical men. We have brought some, and if they had been pressed they

would all have agreed with Dr. Deane. And I would say here to the District Attorney who has spoken of Dr. Deane as disposed to favor me, being my physician, that Dr. Hovey is my physician, and not Dr. Deane.

Look to the great authorities in medical science — Orfila, Berzelius, and others. They have declared that there was no such thing as discovering poison without analysis. No poison produces symptoms which may not be caused by natural causes.

The government relies upon two physicians whose practice is limited to a town, and one of whom has varied his evidence, and has said upon this trial that the symptoms might have been caused by tobacco, bad spirits or bad cider. I think the prisoner was wronged in not having a *post mortem* examination. If the body had been examined, traces of poison would have been discovered in the body or the food. If poison was found in the food of the stomach, they could not charge it upon the prisoner, who was ten miles off in jail.

The doctors depose that the poison was given in small doses. Now the question is, whether it was given before or after the prisoner was in jail. The physicians have not given their opinion whether any of the poison was given after the prisoner was in jail. This is highly important for me. Suppose you lived in a family, and the folks conspired against you, and charged you with giving a man poison, and you are lodged in jail, and after the man is dead they take care of the body. You can do nothing.

After commenting on the testimony and character of Mr. Darling, she continued: The first question is, did the deceased die by poison? Where is the proof? He died ten days after his daughter was lodged in jail. The justice who made the complaint was coroner. His associate justice lived within 200 rods. The body was taken in a clandestine way and buried before people knew he was dead. There was a tomb to deposit bodies in in cold weather. Why was the ground broken for that body? As soon as I heard of it, I sent for my counsel. He came to see me, and left immediately for Washington, and I was left in the gloomy walls of a prison. I knew if the body was examined, I should be found innocent, and if any one else had given him poison, it would be found. I call upon the selectmen to have the body examined.

You nor I do not know of what that man died. The

body lies within ten miles of us, and that would tell whether poison was administered after I was put in jail. Where could we find two physicians who would take the responsibility of cutting the thread of life unless influenced by revenge or hate?

The prisoner here, by way of contrast, related the course pursued by Orfila, Dr. Hunter, the greatest physician of Europe, and other eminent physicians, when called into court. After arguing that there was no satisfactory evidence that a murder had been committed, that the deceased was an old man and had the frailties of old people, and might have died of natural causes, she continued: The government relies upon certain circumstances which were recounted by the prosecuting attorney in his opening address with gross exaggeration and signal ability. We are here to consider the credibility of the witnesses. I need not argue how little confidence is to be placed in those witnesses. They all come from a bad neighborhood.

Here prisoner demanded of her counsel why witnesses had not been called to show the bad character of the neighborhood. She asked if the doctors, the justices, and the neighborhood might not have it in mind to destroy that woman, and then came down upon the neighborhood with a long bloody-bones story. She thought her brother and Darling might have conspired against her, because she had turned one of them out of doors, and threatened to prosecute both.

After recapitulating the questions involved in the case, and making some remarks upon the danger of wrong convictions, she seemed somewhat exhausted; and after a little conversation with her counsel, sat down.

She spoke nearly forty minutes, rather fast, and in quite an oratorical style."

His Honor, Judge DEWEY, gave the case to the jury with an analysis of the evidence as it bore on the causes of death, and some suggestions as to the weight to be given to medical opinions both as to the death and the alleged insanity.

The jury went out in the evening, and at the coming in of the court on the next morning, had not agreed. The court reinstructed them, at their request, on the inferences which they would have a right to draw from some portions of the evidence. They again retired, and shortly came

in with a verdict of "Not guilty, by reason of insanity." It is understood that at first they stood eight for entire acquittal, on the ground that the evidence of the causes of the death was not such as to remove all reasonable doubt. The prisoner was sent, under the order of the court, to the State Lunatic Hospital at Worcester, where she now is, and where it is understood that her hallucinations still continue, without any present prospect of improvement.

It would be difficult to find a parallel to this case in the combination of soundness and force in certain departments of mental action, with absolute unsoundness and wreck in others. It also stands by itself as a case of acquittal on the score of insanity, when poison (implying concealment, calculation, and fear of consequences) was the instrument used.

THE TRIAL OF THE LALOUPETTES, HUSBAND AND WIFE,

FOR THE MURDER OF HER FATHER, IN THE DEPARTMENT OF
YONNE, IN FRANCE.

THE following sketch of a trial for parricide, or rather for an attempt at parricide, in a provincial court of France, prepared for the Law Reporter from the "*Gazette des Tribunaux*," may perhaps be read with interest in connection with the preceding account of a similar occurrence in this country, and our professional readers may observe some illustrations of the contrast between proceedings of this kind in France and America.

"*Cour d'Assises de l'Yonne*" — Session of March 11, 1854.

M. LANT, Counsellor of the Imperial Court of Paris, presiding.

Charge of Parricide by Poisoning — Complicity of a Daughter and a Son-in-Law.

Lalouette and his wife were accused of having poisoned one Guinand, an old man of 82, father of the wife. By the indictment, the husband and wife were jointly and severally charged as principals and accessories in the same crime. This singular circumstance, which, at first glance, seems anomalous, arose from the impossibility of designating either of the Lalouettes exclusively, as principal. The crowd at the trial was great.

For the prosecution, *M. Gerin*; for the accused, *MM. Lecuyer & Lepere*.

At ten o'clock the accused were introduced. Their exterior did not speak in their favor. Lalouette was a man of forty-one years of age; of less than ordinary size, with black hair falling in masses on a very low forehead; his glassy eyes had a slight squint; his complexion was cadaverous, his mouth so pinched and narrow that it hardly permitted his words to escape by jerks. His impassibility was complete. His wife was fifty-four years old, with a blotched and pimply face, high cheek bones, sunken eyes, and close mouth, but, compared to her taciturn husband, rather vivacious in her mode of speaking.

The following are the facts alleged in the case:

On the 28th of November, 1853, Guinand presented himself about five o'clock in the evening, at the lodgings of his children, whose neighbor he was, to cook his supper at their fire. The old man held in his hand a vessel of stone ware, in which for the past ten years he had been accustomed to prepare his soup every day. The woman gave her father some bread which he cut himself, some water which she took from a pail, and continued to attend to her own affairs. Lalouette was there and present at all this. Guinand went out, for ten minutes, to get some milk which he wished to put into his soup; he found none, returned, carried his soup-pot to his own lodgings, put into it some butter and salt and began to eat immediately. But after three spoonfuls he was forced to stop. "This soup," he exclaimed, "has bad salt in it." In order to take away the unpleasant taste of the soup, he went after some milk; but on the way a suspicion crossed his mind, and instead of putting the milk into the soup-pot, he drank it. Soon he was attacked with cramps, and in a few minutes with throes and vomitings. He threw himself on the bed, uttering groans and cries, which, by a strange chance, were not heard by the Lalouettes, although their lodgings were contiguous, and separated only by a slight wall.

The next day the doctor, called by another daughter of Guinand, ascertained the condition of the patient, and the mayor received the declarations of the old man. It was found that Guinand had eaten soup, in which was discovered a considerable quantity of sulphate of copper (blue vitriol) commonly used amongst farmers for steeping seed-corn.

However, the Lalouettes, who saw their father every day, were not at all disturbed; they alone were ignorant of what was passing. The first depositions of the old

man did not inculcate his children; nevertheless, it was judged proper to make an inquiry; a search was made, and although they had declared that they had no poisonous substance in their possession, thirteen grammes of blue vitriol were discovered locked up in a chest. Suspicions immediately arose, but no arrest was made. Soon after Lalouette was known to have made a journey to Auxerre to consult a lawyer on the result of this affair; hints of importance were gathered. The charge was formally made, and it was learnt that they had tried to make the old man declare that he had carried home the wrong soup-pot by mistake. A report was spread that Lalouette, pressed with questions by the magistrate and a neighbor, had said, "Oh! I can answer for myself, but I do not for my wife; she is a bad woman." "Tell us! Speak!" said they. "No; it is too horrible; it shan't come out from here," said he, striking his breast.

The couple were arrested, and motives for the crime were sought for. It was ascertained that twenty years before, Guinand had given up his property to his children, on condition of their paying him a life-annuity in kind. Subsequently, by reason of misunderstandings, the children had been on bad terms with their father, and recently had tried cajolery to win his confidence. It became evident that they had poisoned their father in order to get rid of their burden.

During the trial, as in the preliminary investigation, the Lalouettes held to the same defence, to wit, that their father had made a mistake, and taken a vessel, in which the year before, Lalouette was accustomed to dissolve his vitriol. But this allegation was easily disproved. The vessel used for the soup was found; it was the same that had been used by the old man for ten years. There was no possible error, he knew it very well; and besides, how was it supposable that a vessel, which a year back had been employed in such dangerous preparations, should have remained on Lalouette's sink, and, above all, that there should still have been so much poison in it as to have preserved Guinand's life; for it was the great quantity of the poison which saved him. "Moreover," exclaimed he, "I did not let the soup-pot go out of my hand from the time I left my house until I put it on the fire." The old man walked with crutches, so that once seated, it was difficult for him to rise, and consequently he could not go and come from one part of the chamber to another. But the accusation was supported by other evidence than

the statements of Lalouette. "Let us see," said the magistrate to him, "Your father has been poisoned." "Yes." "He could only have been poisoned at your house?" "Yes." "You and your wife were the only ones present?" "Yes." "Nobody entered during the absence of the old man?" "No one." "He did not carry away the pot during this absence?" "No." "Then it must have been one of you two?" "Without doubt, it was one of us two, but I am innocent; I answer for that."

With such replies, doubt was no longer possible. One was guilty, both doubtless. But which was the principal, and which the accessory? There was the doubt, there the uncertainty. The defence took advantage of this uncertainty; Lalouette's counsel, without accusing his wife, maintained that he was not guilty, and that if there was a crime, which might not be, for an accident was possible, though not probable, this crime was not committed by the husband, and that besides there was a doubt, and the accused was entitled to the benefit of this doubt. The same theory was supported by her advocate, and this double argument appeared to make a deep impression on the jury.

The judge summed up in a very able manner, and at nine o'clock in the evening, the jury entered their room to answer the following questions: "Is Lalouette guilty of poisoning? Was his wife accessory? Is the woman guilty of poisoning? Was her husband accessory?"

After three-quarters of an hour, the jury brought in a verdict of guilty, with extenuating circumstances. Lalouette was found guilty of poisoning. His wife was found guilty as an accessory, and, consequently, both were sentenced to hard labor for life.

LEADING CRIMINAL CASES.

Court of King's Bench, Thursday, February 12, 1761.

REX v. WHEATLY.¹

Crimes — Private Injuries — Distinction between.

MR. NORTON, for the prosecutor, showed cause why judgment should not be arrested; a rule for that purpose having been obtained, upon a motion made by Mr. Morton

¹ 2 Burrow, 1125; and 1 Wm. Black. R. 273.

on Monday, 26th January last, in arrest of judgment upon this indictment for knowingly selling amber-beer short of the due and just measure, (whereof the defendant had been convicted.) The charge in the indictment was, "That Thomas Wheatly, late of the parish of St. Luke, in the county of Middlesex, brewer, being a person of evil name and fame, and of dishonest conversation, and devising and intending to deceive and defraud one Richard Webb of his monies, on, &c., at, &c., falsely, fraudulently and deceitfully did sell and deliver, and cause to be sold and delivered, to the said Richard Webb, sixteen gallons, and no more, of a certain malt liquor commonly called amber, for and as eighteen gallons of the same liquor; which said liquor, so as aforesaid sold and delivered, did then and there want two gallons of the due and just measure of eighteen gallons, for which the same was sold and delivered as aforesaid; (the said Thomas Wheatly then and there, well knowing the same liquor so by him sold and delivered to want two gallons of the due and just measure as aforesaid;) and he the said Thomas Wheatly did receive of the said Richard Webb the sum of fifteen shillings, &c., for eighteen gallons, &c., pretended to have been sold and delivered, &c., although there was only sixteen gallons so as aforesaid delivered: and he the said Thomas Wheatly, him the said Richard Webb of two gallons of, &c., fraudulently and unlawfully did deceive and defraud; to the great damage and fraud of the said Richard Webb, to the evil example of others in the like case offending, and against the peace of our sovereign Lord, the King, his crown and dignity."

Mr. Morton and *Mr. Yates*, who were of counsel for the defendant, (to arrest the judgment,) objected that the fact charged was nothing more than a mere breach of a civil contract; not an indictable offence. To prove this, they cited *Rex v. Combrun*, P. 1751, 24 G. 2, B. R., which was exactly and punctually the same case as the present, only *mutatis mutandis*. And *Rex v. Driffeld*, Tr. 1754, 27, 28 G. 2, B. R. S. P.; — an indictment for a cheat, in selling coals as and for two bushels, whereas it was a peck short of that measure. There the indictment was quashed on motion. *Rex v. Hannah Heath*, — an indictment for selling and delivering 17 gallons 3 quarts and $\frac{1}{2}$ pint of *geneva*, (and the like of brandy,) as and for a greater quantity, was quashed on motion. In 1 Salk. 151,

Nehuff's case, P. 4 Ann. B. R., a *certiorari* was granted to remove the indictment from the Old Bailey; because it was not a matter criminal, — it was “borrowing 600*l.* and promising to send a pledge of fine cloth and gold dust; and sending only some coarse cloth, and no gold dust.” In *Tremaine*,¹ title *Indictment for Cheats*, all of them either lay a conspiracy, or show something amounting to a false token. A mere civil wrong will not support an indictment. And here is no criminal charge: it is not alleged, “that he used false measures.” The prosecutor should have examined and seen that it was the right and just quantity.

Mr. Norton, pro rege, offered the following reasons why the judgment should not be arrested. The defendant has been convicted of the fact. He may bring a writ of error, if the indictment is erroneous. This is an indictable offence; 'tis a cheat, a public fraud, in the course of his trade: he is stated to be a brewer. There is a distinction between private frauds, and frauds in the course of trade. The same fact may be a ground for a private action, and for an indictment too. None of the cited cases were after verdict. It might here (for aught that appears to the contrary,) have been proved, “that he sold this less quantity *by false measure* :” and every thing shall be presumed in favor of a verdict. And here is a false pretence, at the least: and it appeared upon the trial to be a very foul case.

The counsel for the defendant, in reply, said that nothing can be intended or presumed, in a criminal case, but *secundum allegata et probata*: it might happen without his own personal knowledge. And they denied any distinction between this being done privately, and its being done in the course of trade.

LORD MANSFIELD. — The question is, whether the fact here alleged be an indictable crime or not. The fact alleged is —

(Then his Lordship stated the charge,² verbatim.)

The argument that has been urged by the prosecutor's counsel, from the present cases coming before the court after a verdict, and the cases cited being only of quashing upon motion, before any verdict, really turns the other way: because the court may use a discretion, “whether it be

¹ 5 Tremaine's Pleas of the Crown, pp. 85 to 111.

² 5 Ante, 1125; 2 Dur. & East, 564; Cro. Jac. 19; 1 Ld. Ray. 2.

right to quash upon motion, or put the defendant to demur;" but after verdict, they are obliged to arrest the judgment if they see the charge to be insufficient. And in a criminal charge, there is no latitude of intention, to include any thing more than is charged: the charge must be explicit enough to support itself. Here, the fact is allowed; but the consequence is denied: the objection is, that the fact is not an offence indictable, though acknowledged to be true as charged. And that the fact here charged should not be considered as an indictable offence, but left to a civil remedy by an action, is reasonable and right in the nature of the thing: because it is only an inconvenience and injury to a private person, arising from that private person's own negligence and carelessness in not measuring the liquor, upon receiving it, to see whether it held out the just measure or not.

The offence that is indictable must be such a one as affects the public. As if a man uses false weights and measures, and sells by them to all or to many of his customers, or uses them in the general course of his dealing: so, if a man defrauds another, under false tokens. For these are deceptions that common care and prudence are not sufficient to guard against. So, if there be a conspiracy to cheat: for ordinary care and caution is no guard against this. Those cases are much more than mere private injuries: they are public offences. But here, it is a mere private imposition or deception: no false weights or measures are used; no false tokens given; no conspiracy; only an imposition upon the person he was dealing with, in delivering him a less quantity instead of a greater; which the other carelessly accepted. 'Tis only a non-performance of his contract: for which non-performance he may bring his action. The selling an unsound horse, as and for a sound one, is not indictable: the buyer should be more upon his guard.

The several cases cited are alone sufficient to prove, that the offence here charged is not an indictable offence. But, besides these, my brother Denison informs me of another case, that has not been mentioned at the bar. It was M. 6 G. 1, B. R., *Rex v. Wilders*, a brewer: he was indicted for a cheat, in sending in, to Mr. Hicks, an ale-house keeper, so many vessels of ale marked as containing such a measure, and writing a letter to Mr. Hicks, assuring him that they did contain that measure; when in fact they did

not contain such measure, but so much less, &c. This indictment was quashed on argument, upon a motion : which is a stronger case than the present. Therefore the law is clearly established and settled ; and I think on right grounds ; but on whatever grounds it might have been originally established, yet it ought to be adhered to, after it is established and settled. Therefore, (though I may be sorry for it in the present case, as circumstanced,) the judgment must be arrested.

Mr. Just. DENISON concurred with his Lordship.

This is nothing more than an action upon the case turned into an indictment. 'Tis a private breach of contract. And if this were to be allowed of, it would alter the course of the law ; by making the injured person a witness upon the indictment, which he could not be (for himself) in an action. Here are no false weights, nor false measures ; or any false token at all : nor any conspiracy. In the case of *The Queen v. Maccarty et al.*,¹ there were false tokens, or what was considered as such. In the case of *The Queen v. Jones*, 1 Salk. 379,² the defendant had received 20*l.* pretending to be sent by one who did not send him — *Et per Cur.* "It is not indictable, unless he came with false tokens : we are not to indict one man for making a fool of another ; let him bring his action." If there be false tokens, or a conspiracy, it is another case. *The Queen v. Maccarty*³ was a conspiracy, as well as false tokens. *Rex v. Wilders* was a much stronger case than this ; and was well considered. That was an imposition in the course of his trade ; and the man had marked the vessels as containing more gallons than they did really contain, and had written a letter to Mr. Hicks attesting that they did so. But the present case is no more than a mere breach of contract : he has not delivered the quantity which he undertook to deliver. The court use a discretion in quashing indictments on motion : but they are obliged to arrest judgment when the matter is not indictable. And this matter is not indictable : therefore the judgment ought to be arrested.

Mr. Just. FOSTER. — We are obliged to follow settled and established rules already fixed by former determinations in cases of the same kind. The case of *Rex v. Wilders* was

¹ 6 Mod. 301 ; 2 Ld. Raym. 1179.

² 2 Ld. Raym. 1013 ; and 6 Mod. 105, S. C.

³ 2 V. ut supra, and 6 Mod. 302 particularly.

a strong case ; (too strong, perhaps ; for there were false tokens : the vessels were marked as containing a greater quantity than they really did.)

Mr. Just. WILMOT concurred. This matter has been fully settled and established, and upon a reasonable foot. The true distinction that ought to be attended to in all cases of this kind, and which will solve them all, is this — that in such impositions or deceits, where common prudence may guard persons against the suffering from them, the offence is not indictable, but the party is left to his civil remedy for the redress of the injury that has been done him : but where false weights and measures are used, or false tokens produced, or such methods taken to cheat and deceive, as people cannot, by any ordinary care or prudence be guarded against, there it is an offence indictable. In the case of *Rex v. Pinkney*, P. 6 G. 2, B. R. upon an indictment “for selling a sack of corn (at Rippon market) “which he falsely affirmed to contain a Winchester bushel, *ubi revera et in facto plurimum deficiebat, &c.*,” the indictment was quashed upon motion.

In the case now before us, the prosecutor might have measured the liquor, before he accepted it : and it was his own indolence and negligence if he did not. Therefore common prudence might have guarded him against suffering any inconvenience by the defendant's offering him less than he had contracted for. This was the case of *Rex v. Pinkney* ; and it was there said, that if a shopkeeper who deals in cloth, pretends to sell ten yards of cloth, but instead of ten yards bought of him, delivers only six, yet the buyer cannot indict him for delivering only six ; because he might have measured it, and seen whether it held out as it ought to do or not. In this case of *Rex v. Pinkney*, and also in that case of *Rex v. Combrun*, a case of *Rex v. Nicholson*, at the Sittings before Ld. Raymond after Michaelmas term, 4 G. 2, was mentioned ; which was an indictment for selling six chaldron of coals, which ought to contain 36 bushels each, and delivering six bushels short : Lord Raymond was so clear in it, that he ordered the defendant to be acquitted.

Per Cur. unanimously, the judgment must be arrested.

The definition of a crime, as given by Blackstone and other elementary writers, comprises all crimes, whether existing and recognised as such at common law, or whether created wholly by statute. Blackstone's

definition, familiar to all, is — “An act committed, or omitted, in violation of a public law either forbidding or commanding it.” The same words are used by Professor Greenleaf, in 3 Greenl. § 1. Other elementary writers have given substantially the same definition. But as this embraces statutory as well as common law offences, and as we propose now to treat of crimes at common law, strictly so called, as introductory thereto we suggest the following more limited definition, viz. — *At common law, a crime is an act done with criminal intent, and to the injury of the public.*

I. *There must be some act done.* An intent to commit a crime is not indictable.

Thus, in *Rex v. Heath*, Russ. & Ry. 184, A. D. 1810, the defendant was indicted for having in his possession certain counterfeit coin, knowing it to be counterfeit, with intent to pass the same as good. All the judges, in Trinity Term, 1810, considered the case, and the majority were of opinion that there was no act done, simply by having the coin in his possession, although he knew it to be counterfeit, and that an intent without an act was not a misdemeanor. They also considered *Rex v. Sutton*, 2 Stra. 1074, as untenable. Four years afterwards the same point was raised in *Rex v. Stewart*, Russ. & Ry. 288, and was reserved for the opinion of the twelve judges. They were unanimously of opinion that this was not an offence, and judgment was arrested. The doctrine of these cases was also expressly adopted in the late case of *Dugdale v. Regina*, 16 Eng. Law and Eq. R. 380. In this case A. was indicted for unlawfully and knowingly preserving and keeping in his possession indecent and obscene prints and libels, with intent and purpose to publish and disseminate them. This was held not to be a crime, since the prints might have been innocently procured, and the intent to publish them may not have been entertained until afterwards; and entertaining the intent was not an act, and therefore not the commencement of a misdemeanor. *Comm'r v. Morse*, 2 Mass. 138, A. D. 1806, illustrates the same principle. There the defendant was charged with having in his possession certain forged notes on a bank which he knew had no existence, “with intent falsely, fraudulently and deceitfully to utter and pass the same as true and genuine notes of a genuine bank. To this indictment he demurred, and the court said, “The allegations amount only to an intention to cheat, which at common law is not indictable.” The same decision was made in *The State v. Penny*, 1 Car. L. Rep. 517.

On the same principle *Regina v. Meredith*, 8 Car. & P. 589, A. D. 1838, was decided. The defendant was indicted for an assault with intent to commit a rape. Abinger, Baron, said — “I think an attempt to commit a misdemeanor is not indictable, unless there be some illegal act done; and I think that taking any step towards the commission of a misdemeanor, not by an illegal act, would not be sufficient.”

So it was said by Ld. Kenyon, in 7 T. R. 514, to be “a principle of natural justice and of our law, that the intent and the act must both concur to constitute the crime,” but a limitation of this principle is to be observed in cases where the law positively forbids a thing to be done, and such act may become thereupon *ipso facto* illegal, even though done ignorantly, and consequently the doing it is the foundation for an indictment, or other penal proceeding, even without the aid of any corrupt motive. For instance, the Stat. 5 & 6 Vict., c. 93, s. 3, forbids a dealer in tobacco to have any adulterated tobacco in his possession, under a penalty of £200. The defendant had such tobacco in his possession, but it was proved he bought it as genuine, and did not know, or have any cause to suspect it was adulterated. *Crompton* argued that here the defendant

was morally innocent, and that as there was no knowledge, there was no guilty intent, and therefore that the defendant could not be guilty. But all the judges were of a contrary opinion, and said the defendant was bound to know what he was selling, and what he had in his possession. *Regina v. Woodrow*, 15 M. & W. 404, A. D. 1846. And several earlier cases had acted upon the same rule. *The Attorney General v. Lockwood*, 9 M. & W. 378, A. D. 1842; *Rex v. Marsh*, 4 Dowl. & Ry. 260.

Cases may, and probably do differ, as to what is sufficient to constitute such an overt act as to complete the crime; but all decisions, ancient and modern, recognise the principle, that a criminal intent alone, unaccompanied by any overt act, is not punishable by the common law. We say cases may and do differ in their application of the principle, and may sometimes be in direct conflict with each other, upon the proper effect of some particular conduct. Thus in *Rex v. Sutton*, 2 Stra. 1074, A. D. 1737, more fully reported in Cas. t. Hardw. 370, it was thought that having instruments for counterfeiting coin in one's possession with intention to coin money and to pass it as genuine, was a sufficient act to be indictable, and the same is laid down as law in 3 Greenl. Ev. § 2. See *Dorsett's case*, 5 Rog. Rec. 77; *Murphy's case*, 4 Ib. 42. But as we have before seen, the more modern cases have established a different doctrine. But all agree that procuring counterfeit coin with such intent is indictable. *Rex v. Fuller*, Russ. & Ry. 308, A. D. 1815; *Dugdale v. Regina*, 16 Eng. Law & Eq. R. 380, A. D. 1852.

It may not be unnecessary to add, however, that an act, to be criminal, need not be successful, for an attempt to commit a crime is no less a crime because the object was not attained. Thus in *Rex v. Scofield*, Cald. 397, A. D. 1784, it was held that attempting to set fire to a building, the firing of which was considered a misdemeanor, was itself, also, a misdemeanor. So, words alone may be a sufficient act to be criminal; as, to solicit a servant to steal his master's goods. *Rex v. Higgins*, 2 East, 5, A. D. 1809. Attempting to bribe a privy counsellor to procure an office for an applicant. *Rex v. Vaughan*, 4 Bur. 2494, A. D. 1769. Attempting to suborn one to commit perjury, or to absent himself from a public prosecution, when summoned as a witness. *State v. Keyes*, 8 Verm. 57, A. D. 1836; *Rex v. Lady Lowly*, Fitzgib. 263, A. D. 1731; *State v. Carpenter*, 20 Verm. 9, A. D. 1847. Soliciting another to commit adultery, *The State v. Avery*, 7 Conn. 267, A. D. 1828, or any misdemeanor, *Comm'th v. Harrington*, 3 Pick. 26, A. D. 1825;—are each and all indictable at common law, although the crime which was solicited or attempted to be procured was never in fact completed.

This criminal intent also need not always be proved as a separate and distinct fact, or by separate and different evidence than that which proves the *corpus delicti*, for the criminal intent may and generally is and should be inferred from the commission of the wrongful act. *Comm'th v. York*, 9 Met. 93; *Rex v. Farrington*, Russ. & Ry. 207.

Neither in cases of injuries produced by negligence, is it necessary to prove any positive, actual intent to commit the crime, for the evil intent is to be inferred from the wanton negligence and general disregard of others' rights. But this will form the subject of a subsequent article.

II. The act done must be done with a criminal intent. *Nemo est reus, nisi mens sit rea*.

The cases of infants, lunatics, &c., are familiar illustrations of this principle. Cases of mistake, and accident, also furnish some better examples. Thus Foster, in his Crown Law, tells us of a case which came before him. Upon a Sunday morning, a man and his wife went a

mile or two from home with some neighbors, to take a dinner at the house of their common friend. He carried his gun with him, hoping to meet with some diversion by the way; but before he went to dinner he discharged it and set it up in a private place in his friend's house. After dinner he went to church; and in the evening, returned home with his wife and neighbors, bringing his gun with him, which was carried into the room where his wife was, she having brought it part of the way. He, taking it up, touched the trigger; and the gun went off and killed his wife, whom he dearly loved. It came out in evidence, that, while the man was at church, a person belonging to the family privately took the gun, charged it, and went after some game; but, before the service at church was ended, returned it, loaded, to the place whence he took it, and where the defendant, who was ignorant of all that had passed, found it, to all appearance, as he had left it. "I did not inquire," says Mr. J. Foster, "whether the poor man had examined the gun before he carried it home; but being of opinion, upon the whole evidence, that he had reasonable grounds to believe that it was not loaded, I directed the jury, that if they were of the same opinion, they should acquit him: and he was acquitted." Fost. 265.

So in *Rex v. Levett*, cited in Cro. Car. 538, A. D. 1640, the defendant was indicted for the homicide of a woman called Frances Freeman, but it appearing that the defendant did the act ignorantly, and without the intention to hurt the woman, it was resolved that it was manslaughter.

So, in *Rex v. Gill*, 1 Stra. 191, A. D. 1719, the defendant was indicted for throwing down skins in a yard which was a public way, which put out another's eye. "On the evidence, it appeared that the wind took the skin and blew it out of the way, and so the damage happened. The chief justice remembered the case of the hoy, (*ante*, 128,) and that in *Hob.* 134, where, in exercising, one soldier wounded another, and a case in the year-book, of a man lopping a tree, where the bough was blown at a distance and killed a man. And in the principal case the defendants were acquitted."

And in a late case in America, it was said to be a sacred principle of criminal jurisprudence, that the intention to commit the crime is of the essence of the crime, and to hold that a man should be held criminally responsible for an act, of the actual commission of which he was at the time ignorant, would be intolerable tyranny. See *Duncan v. The State*, 7 Humph. 150, A. D. 1846. This was an indictment under a statute of Tennessee, against the captain of a steamboat, for unlawfully carrying away a slave. The evidence was that the slave secreted himself on the defendant's boat, without his knowledge, and was thus transported from his master. The defendant being found guilty below, appealed, and the judgment was arrested, as the indictment did not charge that the defendant received the slave, and the evidence did not prove that he intentionally carried him away.

It should be remembered, however, that wrongful acts done through mistake or ignorance of the law, are nevertheless punishable as crimes; for every person is bound to know the law of the land; and this rule applies even to foreigners who commit a crime in this country which they did not in fact know to be such, as it was not penal in their own country. *Rex v. Esop*, 7 Car. & Payne, 456, A. D. 1836. And see *Baronet, Ex parte*, 16 Eng. Law & Eq. R. 361, a case of a duel between Frenchmen, who were temporarily residing in England.

So, it should not be forgotten, that although an act may be itself apparently lawful, yet if it is done with a criminal intent, and produces a public injury, it thereby becomes punishable as a crime. Lord Mansfield, C. J., in *Rex v. Scofield*, Cald. 397; *Fairlee v. The People*, 11 Ill. 1, A. D. 1849.

Much more, if one does an act *unlawful in itself*, and it produces an injury not intended by him, he is responsible for the consequences, and the law conclusively infers the malicious intent. Thus, where A. fired a pistol at a person on horseback, only with the intent to cause the horse to throw him, but the ball took effect on B. and caused his death, the act was held to be murder. *State v. Smith*, Strob. 77, A. D. 1847.

So, if a person having determined to take the life of another, discharges a gun at him, not knowing whether it was loaded or not, but with the expectation and desire that it is, and the death of the latter is caused, the former is guilty of murder. *Comm'th v. Green*, 1 Ashm. 289, A. D. 1826.

III. *The act done must be an injury to the public.*

An infringement of private rights alone, although done wilfully, is not, at common law, a crime.

And so far is this principle carried, that not even is a conspiracy to commit a trespass to private property indictable, although the injury be in fact committed out. *Rex v. Turner*, 13 East, 228, A. D. 1811; where several persons agreed to go, and did go, into a preserve for hares belonging to a third person, for the purpose of snaring them, Lord Ellenborough said, "I should be sorry to have it doubted, whether persons agreeing to go and sport upon another's ground, in other words, to commit a civil trespass, should be thereby in peril of an indictment for an offence, which would subject them to infamous punishment."

"The distinction of public wrongs from private," says Blackstone, "of crimes and misdemeanors from civil injuries, seems principally to consist in this — that private wrongs, or civil injuries, are an infringement or privation of the civil rights which belong to individuals, considered merely as individuals; public wrongs, or crimes and misdemeanors, are a breach and violation of the public rights and duties, due to the whole community, considered as a community, in its social aggregate capacity." 4 Bl. Comm. 5.

Neither is an injury which is *quasi public*, always indictable as crime. Thus, in *Rex v. Richards*, 8 T. R. 634, A. D. 1800, the defendants were indicted for the non-repair of a road. The road had been laid out under an act of Parliament, for the use of nine parishes, and it was made the duty of the defendants, as inhabitants of six of the parishes, to keep the road in repair, which duty they had neglected. Upon the question whether this was an indictable offence, the court said — "However convenient it might be that the defendants should be indicted, there was no legal ground on which this indictment could be supported; that the known rule was, that those matters only that concerned the public, were the subject of an indictment; that the road in question being described to be a private road, did not concern the public, nor was of a public nature, but merely concerned the individuals who had a right to use it; that the question was not varied by the circumstance that many individuals were held to repair, or that many others were entitled to the benefit of it," &c.; and they also held, that the fact that the road was set out under a public act, did not make the non-repair of it indictable.

Rex v. Lloyd, 1 Esp. R. 200, A. D. 1802, furnishes another good illustration of this principle. The defendant, a tinman, was indicted for a nuisance, from the noise made in carrying on his trade. The prosecutors were attorneys in Clifford's Inn. From the evidence, it appeared that the noise affected only three numbers, 14, 15 and 16, of that inn. Lord Ellenborough said that, upon this evidence, the indictment could not be sustained; and that it was, if any thing, a private nuisance. It was confined to the inhabitants of three numbers of Clifford's Inn only; it did not even

extend to the rest of the society ; it was therefore not of sufficiently general extent to support an indictment, and the defendant was acquitted.

So, in *Rex v. Medley*, 6 Car. & P. 292, A. D. 1834, Lord Denman ruled in a prosecution against a gas company for poisoning the water of the Thames by conveying refuse gas into it, that the fact, that by this gas the fish were much diminished, and a considerable number of fishermen thrown out of employment, was not of itself sufficient ground to sustain the indictment ; for if it were so, every successful speculation in trade might be the subject of a prosecution. The act complained of must be to the common nuisance of the king's subjects.

The most usual injuries to private rights, which it has been attempted at times to punish as crimes, are such as arise either from breach of contract, or from fraud, or from trespasses to either real or personal estate.

(1.) *As to injuries from breach of contract.*

Although at the present day it may seem too clear ever to have admitted of a doubt, that the non-fulfilment of a contract could not be a crime, yet in earlier times, courts were frequently obliged to meet and pass upon such indictments, before that species of redress for private wrongs was entirely abandoned, and before people ceased to invoke the arm of the criminal law to punish those who had simply violated their word. We give below a few of the earlier cases upon this subject.

In *Rex v. Bainham*, there was an indictment for that A. borrowed 5*l.* of the prisoner, and pawned gold rings to secure the payment ; and at the day, A. tendered the money, but the prisoner refused to deliver up the rings ; but this was considered only a breach of civil contract, and not indictable. 1 Salk. 379. So in *Rex v. Bradford*, 2 Ld. Raym. 366, A. D. 1692, a physician was indicted for not curing his patient in three weeks, as he had promised to do, but the indictment was quashed as being only a breach of contract. And where the justices had made an order that A. should pay his tailor 7*l.* for work done, which he refusing to do, was indicted, the indictment was subsequently quashed, for it was a matter not indictable. *Rex v. Brown*, 2 Salk. 189.

In *Rex v. Nehuff*, 1 Salk. 151, A. D. 1706, the defendant had borrowed 600*l.*, and promised to send the lender fine cloth and gold dust as a pledge, but in fact he sent no gold dust, but only some coarse cloth, worth little or nothing. The court said that was not a matter criminal, but it was the prosecutor's fault to repose such confidence in the defendant.

But there are some acts, which although they may seem to be only breaches of contract, have yet been considered of such a nature as to amount to a misdemeanor. Thus in *Rex v. Friend*, Russ. & Ry. 20, the majority of the court considered it an indictable offence to neglect to provide sufficient food, clothing, &c., for an infant apprentice of tender years, who was unable to provide for and take care of itself, and whom the defendant was obliged by contract to provide for, so that such child's health was materially injured thereby. But Justice Chambre thought it was not in any manner an indictable offence, being founded wholly on contract. And see *Rex v. Squire*, 1 Russ. on Crimes, 490. But to render such an act indictable, the child must have been of such tender years, that it could not act or judge for itself. *Regina v. S—*, 5 Cox, C. C. 279, A. D. 1851 ; *Rex v. Ridley*, 2 Camp. 650, A. D. 1811.

The misdemeanor, therefore, in *Rex v. Friend*, would not seem to be founded so much on a breach of contract, as on an intentional injury to another's life and health. From injuries by mere breach of contract, therefore, we pass to

(2.) *Injuries by means of fraud.*

The consideration of which, together with the other subjects to be considered in this connection, we defer to our next number. E. H. B.

Recent American Decisions.

*Supreme Judicial Court of Massachusetts, Suffolk, ss.,
March Term, 1854.*

JOHN KENT *v.* THOMAS GARVIN.¹

Evidence — Shop Books.

A book containing entries of ale sold, copied by a clerk every Saturday night from the delivery-book of the drayman, is inadmissible to prove the delivery of the articles charged, when supported only by the testimony of the clerk that the charges were so copied, and compared and corrected, by the drayman and himself.

The fact that some of the articles were delivered six days before the entries, would not itself perhaps be fatal to the competency of the book, but taken in connection with the absence of the testimony of the person who delivered the articles and made the original memorandum, it renders it entirely inadmissible.

THIS was an action of assumpsit for several barrels of ale, alleged to have been sold and delivered to the defendant. The case was referred to an auditor, whose report (so far as is material to the decision of the court) was as follows: — To prove his account, the plaintiff offered his books of original entries, with the testimony of the clerk who kept the books. This testimony was as follows: James Kettelle, Jr., the plaintiff's clerk, testified that he was the plaintiff's book-keeper; that the book produced by him was the plaintiff's book of original entries; that he made the entries; that he took them from the delivery-book of the drayman every Saturday night; that the drayman stood by his side and read off the entries, and he copied them into the plaintiff's book, and then the drayman read them off from the delivery-book, and compared them; and if they were right, he (the witness) checked them in the plaintiff's book; that this was done in the present case, and that the drayman was now in California.

At the trial, the plaintiff objected to the acceptance of the auditor's report, and to its being read to the jury, for the following reasons, —

1. The clerk's book, upon the evidence reported by the auditor, was not the book of original entry of the plaintiff, but the drayman's book was such.

2. The drayman's book, if not the book of original entry, was the original memoranda from which the plaintiff's clerk

¹ This and the following case will appear in the first volume of Gray's Reports.

made the entries sworn to by him. As the drayman is not produced, his unsupported declarations to the plaintiff's clerk is his only evidence that such memoranda were made by him, or were made at all, or when made.

3. If the drayman's memoranda are proved by his declarations to the plaintiff's clerk, it appears by the reported evidence that the drayman read off to the clerk on Saturday night all the deliveries of the whole week, and as most of the articles here in question are charged as delivered on Monday, an interval of six days elapsed between the delivery and the charge. Declarations made more than one day after a transaction, cannot be considered as of the *res gestæ*.

These objections were overruled, and the report was read to the jury, who returned a verdict for the plaintiff. The defendant excepted.

Edward G. Parker, for the defendant.

S. J. Gordon, for the plaintiff, contended that the plaintiff's book of original entries, supported by the evidence of the book-keeper, established a *prima facie* case for the plaintiff. 1 Greenl. Ev. § 115; *Arnold v. Sabin*, 1 Cush. 526; *Morris v. Briggs*, 3 Cush. 342; *Barker v. Haskell*, Suffolk, March Term, 1852; *Mathes v. Robinson*, 8 Met. 271.

The opinion of the court was delivered by

BIGELOW, J. — It has long been the settled law of this Commonwealth, that it is not a valid objection to the competency of a party's book, supported by his suppletory oath, that the entries therein were transcribed from a slate or memorandum-book in which they were first entered for a temporary purpose, although the entries on the slate or memorandum were made by a person other than the party who copied them on to the book. In such cases the entry of the charges in the regular day-book of the party, is deemed to be the first and original entry, and as such, competent proof, with the oath of the party, of the charges therein made. *Faxon v. Hollis*, 13 Mass. 427; *Smith v. Sanford*, 12 Pick. 139; *Ball v. Gates*, 12 Met. 491; *Morris v. Briggs*, 3 Cush. 342. But in all these cases it will be found, that in addition to the oath of the party who made the entries in the day-book, the testimony of the person who made the entries on the slate or memorandum-book was adduced to prove that articles were delivered or work performed of a character similar to those charged on the day-book, at or about the time of the entries therein. The charges in the book, supported by the oath of the party making the entries, are often the only evidence of dates, items and amounts, which individuals cannot well retain in their memories.

The case at bar goes beyond any adjudged case. The attempt is here made to put in evidence the book of a party, supported by the oath of his clerk who made the entries, for the purpose of proving the sale and delivery of articles made by a third person in the employment of the plaintiff, whose evidence is not produced in support of the charges; nor is any evidence offered from any source other than from the book, to show that at the time the charges were made, any articles, similar in character to those charged, were delivered by the plaintiff to the defendant. It is manifest that here an important link in the chain of evidence is wanting. The clerk who made the entries had no knowledge of the correctness of any charge on the book. All he can say is, that the drayman who delivered the articles for the plaintiff gave to him from his memorandum-book the items which were entered on the book. The case therefore rests on the mere unsupported statement of a third person, whose fidelity and accuracy there are no means of ascertaining and testing. It is in its nature mere hearsay testimony. To permit the books of a party to be competent proof under such circumstances, would be extending the rule applicable to this anomalous and dangerous species of evidence quite too far.

The book in the present case is also liable to the further objection, that the entries were not made, in many instances, until six days after the date of the alleged delivery of the articles to the defendant. Of itself this objection would not perhaps be fatal to the competency of the book, but taken in connection with the absence of the testimony of the person who delivered the articles and made the original memorandum, it renders the book entirely inadmissible. *Kessler v. M'Conachy*, 1 Rawle, 435; *M' Coy v. Lightner*, 2 Watts, 347.

For these reasons we think that the court below erred in permitting the auditor's report, founded on the charges in the book, to be read to the jury in support of the plaintiff's claim.

Defendant's exceptions sustained, and verdict set aside.

WALLIS R. COLLINS v. PETER G. DOUGLASS ET AL.

Poor Debtor's Oath — Form and Service of Citation — Officer's Return.

A citation was served on a creditor, giving notice of a creditor's intention to take the poor debtor's oath, which recited, "whereas G. A., keeper of the jail in Boston, in the county of Suffolk, has made known to me, &c. &c., that Peter Douglass, of Boston aforesaid, physician, who is committed on an execution issued from the Court of Common Pleas,

holden at Boston, for and within the county of Suffolk, and dated the 13th day of August, A. D. 1851, for thirty-six dollars and seventy-two cents damage, and five dollars and six cents costs of suit in a civil action, and two dollars costs of commitment, in which you are the creditor, has represented to said jailer," &c. The debtor was sued by the name of Peter G. Douglass, signed his bond for the prison limits in that name, and his application for the oath was by that name; and it was *held*, that this did not invalidate the certificate of discharge given by the justices on his taking the oath.

It was admitted by the adverse party, in an action on the bond for the prison limits, that the copy of the citation served on the creditor was not signed by the same magistrate who signed and issued the original citation, but an officer having returned on the latter that he had served a copy of that, his return was held conclusive in that action.

THIS was an action on a bond for the prison limits. The defence was a discharge of the principal by two justices of the quorum, on taking the poor debtor's oath, which the plaintiff claimed was invalid — 1st, because the copy of the citation served upon the plaintiff's attorney, purported to be signed and issued by a different magistrate from the one who actually signed and issued it, and the fact being admitted by the defendant the return of the officer was not conclusive. 2d, because the principal defendant was sued by the name of Peter G. Douglass, signed the bond in suit by that name, and his application for the oath was by that name, while in the citation he was called Peter Douglass. The citation recited that "whereas G. A., keeper of the jail in Boston, in the county of Suffolk, has made known to me, &c. &c. that Peter Douglass, of Boston, aforesaid, physician, who is committed on an execution issued from the Court of Common Pleas holden at Boston, for and within the county of Suffolk, and dated the 13th day of August, A. D. 1851, for thirty-six dollars and seventy-one cents damage, and five dollars and six cents costs of suit in a civil action, and two dollars costs of commitment in which you are the creditor, has represented to said jailer," &c. The officer serving the citation, returned on the original citation, that he "served the above citation on the above-mentioned Collins, by giving in hand to H. D. A. Esq., the plaintiff's attorney, an attested copy of the same."

The opinion of the Court was delivered by MERRICK, J. The bond in this suit was given by the principal defendant Douglas, when committed to jail on execution for debt, to obtain the liberty of the prison limits. He was subsequently discharged from custody by the jailer upon receiving from two justices of the peace, both of the quorum, a

certificate in the form prescribed in the 10th section of the 98th chapter of the Revised Statutes; that after due examination they had administered to the said Douglass the oath to be taken by poor prisoners committed on execution for debt. This certificate is not conclusive evidence of his right to be at large, and the plaintiff attempts to invalidate it by showing that in the preliminary proceedings respecting notice to the creditor, the requirements of the statute were not complied with. If the fact were so, the defendants cannot avail themselves of it in justification of the withdrawal of Douglass from custody, and his departure from the prison limits was a breach of the condition of the bond. *Baker v. Moffat*, 7 Cush. 259, and cases there cited; *Bruce v. Keogh*, 1b. 536.

Upon the representation to a jailer by a debtor, of his inability to pay the debt for which he is committed, it is made the duty of the justice of the peace to whom that representation is communicated, to fix a time and place for the examination of the debtor, and by a citation under his own hand, duly served upon the creditor, to give him notice thereof, Rev. Stat. c. 98, § 1, § 2. The defendant insists that in neither of these last named particulars, — the citation to the creditor or the service of it upon him — were the requisitions of the statute complied with, and therefore that the subsequent proceedings of the magistrates were irregular and unauthorized, and their certificate given to the jailer was without any legal validity.

The error or deficiency in the citation pointed out by the plaintiff, and which he contends is so material as to vitiate all the subsequent proceedings of the magistrates, is the omission in it of the initial letter of the middle name of the debtor. He is called *Peter* instead of *Peter G. Douglass*. These it is urged, are, or may be, the names of two different individuals; that the creditor, by the service of such a citation upon him, was not certainly informed, and did not necessarily know at whose instance it was issued; and therefore that he was not legally notified that the person who desired to take the benefit of the act for the relief of poor debtors was his debtor, committed on his execution. The statute gives no form of the citation which it is the duty of the magistrate to issue, and it does not prescribe the degree of minuteness with which the persons named in it or the cause for which it is made shall be described. But undoubtedly the description should be, in both particulars, with all reasonable certainty, for it is es-

sential to the security of parties that they have proper notice of all proceedings by which their interest may be affected. And no notice can be effectually given, unless the process served upon a party contains an intelligible statement or recital of the facts which it is material to him to know, and of which it is his right to be informed. It is upon this principle that the case of *Slasson v. Brown*, 20 Pick. 436, cited and relied on by the plaintiff, was decided. The citation in that case was addressed to *Ebenzer B. Slasson*, while the name of the person upon whom it was served, and whose interest it was the object of the suit to affect, was *Edward B. Slasson*. It was an entire variance in the name, and for that cause the court held the defect to be fatal.

But in the present case, there is no such positive error — no such entire variance. If a very small part of the name of the debtor is omitted in the citation, he is not designated by another which does not properly belong to him. But his name is not the only means it affords by which he may be identified and known by the creditor. His profession, occupation, and place of residence; the court wherein the original suit was prosecuted; its precise amount, both in reference to damages and costs; the date of the execution, and the prison to which he was thereon caused by the plaintiff himself to be committed on the execution in his own favor; are all accurately named and described in it. These circumstances are so direct and significant, that it is impossible to doubt that the creditor perfectly well understood for whose benefit the citation was issued, and knew who was intended by the debtor named in it. This is sufficient. Undoubtedly the creditor is entitled to the notice required by law, but a mere verbal variance which could not mislead him or create a doubt in his mind as to the object of the citation, or the person who was described in it as the debtor, ought not to be allowed to vitiate the proceedings of the magistrates. This principle was fully established in the case of *Bussey v. Briggs*, 2 Met. 134, and it requires upon the facts agreed by the parties, that the validity of the certificate given by the magistrates to the jailer should be affirmed.

Of the other objection of the plaintiff, that there was no legal service of the citation upon the creditor, he cannot, in this case, avail himself. In the return made upon it by the officer to whom it was delivered for service, and by whom it was served, it appears that all the requirements of

law in that particular were complied with. In this proceeding the creditor is entirely concluded by it. If the return is false, the remedy of the plaintiff is against the officer, who is responsible to the injured party for all injurious consequences resulting from it. The rule that a legal and sufficient return by an officer upon a precept which he has authority to serve, is conclusive in the suit as to the facts returned, is too well known to require a citation of cases in which it has been affirmed. But reference may be made to the case of *Niles v. Hancock*, 3 Mct. 568, in which the general doctrine was applied to a case precisely like the present. It was there determined that a proper service by a proper officer of a citation to a creditor, to appear at the examination of his debtor, who is committed on execution, is conclusive, and cannot be disputed by the creditor in an action on the debtor's bond, given for the liberty of the prison limits. It need only be added that we adhere to that decision.

Judgment for the defendants on the agreed statement of facts.

H. D. Austin for the plaintiff; *J. C. Park* for the defendants.

Court of Common Pleas, Middlesex, ss., December Term, 1853.

MORGAN SWEENEY v. EDWARD TAYLOR.

Pleadings — Practice — Abatement — &c. &c.

THIS was an action of contract. The plaintiff lived in Cambridge—the defendant in Rhode Island. The writ was served by an arrest of the defendant, and holding him to bail. The affidavit to authorize the arrest, was defective in one or two particulars, so that the service under it was unauthorized and illegal. The return of the officer was as follows: "Worcester ss.: February 1, 1853. By virtue of this writ I have taken the body of the within named Edward Taylor, and held him to bail, and I herewith return the bail bond. Millens Taft, D. Sheriff."

On the back of the writ was the following endorsement: "Arrest. I, Morgan Sweeney, plaintiff, do depose and say, that I expect to recover ten dollars and upwards in this suit, and I have reasonable cause to believe that said Taylor is about to depart beyond the jurisdiction of

said Court, and not to return until the first execution, if any, may issue in said suit." This was signed and sworn to. The writ contained the usual command to attach property or take the body of the defendant. It was made returnable to the March Term, A. D. 1853. On the third day of the said term, the defendant filed a written motion to dismiss, on the ground of the insufficient and illegal service; and on the seventh day of the said term, an affidavit of defence was filed.

On the second day of the June Term, the defendant filed an answer, wherein he pleaded in abatement the matter already referred to, and also answered the plaintiff's declaration upon the merits. The action was then continued to the September Term, and thence to the December Term, when *J. Q. A. Griffin*, for the defendant, argued that the motion to dismiss ought to prevail, because the illegality of the service was apparent upon the writ; and that the plea in abatement must at all events be sustained, as Stat. 1852, chap. 312, sect. 27, provided that it might be made by answer, and the rule of court fixed the time for filing it on the second day of the second Term.

B. F. Butler for the plaintiff, contended that the illegality in the service was not apparent on the writ, inasmuch as another affidavit might have been made in proper form; and that the plea in abatement could not be sustained, because the whole matter was waived by filing the affidavit of defence. To this it was replied that a default would have been entered at the end of ten days, if no affidavit had been filed.

The court, *HOAR J.*, overruled both the motion and the plea.

Recent English Decision.

Court of Exchequer, Michaelmas Term, 1853.—Nov. 12.

RICHARDS v. ROSE.¹

Adjoining Houses — Mutual Support — Sewer.

When a number of houses are built together on a spot of ground in such a manner as to require the mutual support of each other for the purpose of this common protection and security, and the owner afterwards

¹ 17 Jurist, 1036. This will be in Vol. 20, Eng. Law & Eq. Rep.

parts with the possession, either, one at a time, or both together, and the property is afterwards subdivided, the right of mutual support remains.

Semble, per PARKE, B., that this does not deprive the occupier of any of the houses of the right of making a drain to his house.

THE declaration in this case contained two counts. In the first, the plaintiff alleged that his house adjoined the house of the defendant, and had a right to the support thereof; but that the defendant so negligently managed his own property in making a drain as to withdraw that support, and thereby occasioned injury to the house of the plaintiff. The second count was the same as the first, omitting the allegation of the right to support from the house of the defendant. Pleas — first, not guilty, to the whole. Secondly, to the first count, that the house of the plaintiff was not entitled to the support of that of the defendant. At the trial, POLLOCK, C. B., it appeared that the plaintiff and the defendant resided in houses adjoining each other. They were the property of the same landlord, who in August, 1847, demised both to one W., by separate leases for ninety-nine years each; there being no evidence which was prior in point of time, W. assigned the houses by mortgage to B., who assigned them to H., who sold one of them to the plaintiff in July, 1849, and the other to the defendant in the September following. At the time the houses were built, there was no sewer near them, but after the plaintiff and defendants had come into possession, the ground-landlord made a general sewer through the public street; whereupon the defendant, having first obtained the consent of the commissioners of sewers for that purpose, made a house sewer under his own house connected with the public sewer. It did not appear that this work was performed in a negligent manner, but in consequence of it, part of the support of defendant's house being withdrawn from that of plaintiff, the latter cracked and was considerably injured. On this state of facts, it being objected by the defendant's counsel that the action would not lie, the Lord Chief Baron reserved leave to move to enter a nonsuit, but left the case to the jury, who found for the plaintiff, with 25*l.* damages.

Lush on a former day in this term moved accordingly. The question in this case is, whether when two persons occupy adjoining houses under different assignments, the owner of such house has a right to the support of the

other, so as to enable him to maintain an action for damage arising in consequence of its being withdrawn. The plaintiff and defendant derive title to their respective premises from the person who, not being owner in fee, but a lessee, could only convey to each the limited interest he had himself. [PARKE, B. — Still he conveys the premises in the same state in which he himself held them, *i. e.* with all the easements they then had; and consequently by implication he grants the right to have the house supported by the next one, at least until you show the contrary. Would you contend that the defendant had a right to block up the plaintiff's windows, or that the person occupying the lower story of a house could take it away to the destruction of the dwelling of a person inhabiting the upper story?] The party to whom the first lease was executed might have such a right, but in the present case it did not appear which lease was executed first. The subsequent lease could not create the second house a dominant, and convert the house demised by the former lease into a servient tenement. [PARKE, B. — Both these parties derive title under the same landlord, and the premises of each are to be enjoyed as he intended; which intention manifestly was, that each should enjoy his house with all the rights it was entitled to in its then state and condition; one of these rights being that each house should be supported by the other; and this right to support is mutual, and it is therefore immaterial which house was leased first.¹] If that be so, neither party could make a drain for his house. [PARKE, B. — Perhaps he might be entitled to make a drain; for the landlord gives him a right to do every thing necessary for the enjoyment of the premises.] [POLLOCK, C. B. — I think the verdict in this case was absurd in point of the smallness of its amount, and that you are entitled to a rule for a new trial on payment of costs.] We do not desire that. *Cur. adv. vult.*

The judgment of the court was now delivered by

POLLOCK, C. B. — On the point reserved in this case we are all of opinion that there ought to be no rule. When a number of houses are built together on a spot of ground in such a manner as to require the mutual support of each other for the purpose of their common protection and security, and the owner afterwards parts with the possession,

¹ See Gale on Easements, p. 69.

either one at a time, or both together, and the property is afterwards subdivided by mortgage or demised in any other way, it seems necessary, as a matter of common sense, that that right of mutual support remains; and the circumstance of the title of the house having been separated by one act, at one time, or by different acts at different times, can make no difference in this respect. It would be a violation of common sense to hold, that any man who by any means comes into the possession of one of a number of such houses, might say to the occupiers of the neighboring ones, "You are not entitled to the protection and support of my house—I will pull it all down, and allow yours to collapse and fall into ruins." It is impossible not to come to the conclusion, that the law on this subject must be in accordance with the common sense of it; and there is a case where something similar was held with respect to another sort of easement, viz., a right of way. In all such cases the right of mutual dependence and support rests either on a presumed grant from one of the parties, or a presumed reservation of the right by the seller of the property. There will therefore be no rule, for on the point reserved we think the defendant not entitled to it, and Mr. Lush has declared his unwillingness to take one on payment of costs.

Rule refused.

Abstracts of Recent American Decisions.

Supreme Judicial Court of Massachusetts, Suffolk, ss., March Term, 1854.

Action — (See Statute of Frauds) — Contract. W. purchased of B. certain real estate subject to mortgages, and in the deed from B. to W. it was recited that the premises were "subject to one mortgage, &c., and to another for five hundred dollars, with interest, both of which mortgages, with the notes for the security of which they were given, the said W. is to assume and cancel." M. subsequently became the owner of the note for five hundred dollars secured by the last-mentioned mortgage, and brought this action against W. to recover the amount due on the same; but it was held, that such an action would not lie in his favor against W. — *Mellen v. Whipple.*

Action for money had and received — Abandonment. Assumpsit to recover moneys awarded to the plaintiff under the Mexican commission, for compensation for spoliation by the government of Mexico. The

plaintiffs, in 1833, insured certain property, which was seized by the Mexican government and abandoned to the plaintiff, who accepted the abandonment, and paid the amount insured in May 1836. A convention and commission were agreed upon and created, to adjust claims against Mexico, in 1839; a second commission, in 1843, at which last the insured made a claim, in favor of which the commission reported; and after this all his interest was transferred by *mesme* assignments to the defendant. In 1849 the board of commissioners for the distribution of the moneys appropriated for this purpose under the treaty with Mexico of 1848, commenced their sittings, and two or three years after, the defendant obtained the allowance of the claim. Stat. 1849, c. 107, § 8, 9 U. S. Stat. at large, 393, provided for a mode of making and establishing claims for funds awarded, against the party to whom they were allowed, before the Circuit Court of the District of Columbia. The plaintiff made no claim before any commission, nor in the Circuit Court, and after the amount allowed to the defendant had been paid over to him, brought this action against him in 1850; and it was *held*, that the abandonment vested the property in the goods abandoned in the plaintiffs, and gave them all the rights of the original owner for compensation against Mexico; and that the remedy by proceedings before the Circuit Court of Columbia was cumulative, not exclusive; but that, on account of their negligence in not pursuing the claim, and in permitting the original owner to obtain an allowance, so that he appeared to be the owner at the assignment, and in permitting the defendant, a *bonâ fide* purchaser, to pursue the same at his own expense and obtain an allowance thereof, this action could not be maintained. — *Mercantile Marine Ins. Co. v. Corcoran*.

Agent — See Promissory Notes.

Appeal — Mandamus — Way — Judgment. Petition for a mandamus against the Mayor and Aldermen of the city of Boston. The petitioner had appealed to the respondents to assess the damages sustained by him from the laying out of a railroad in said city. After sundry proceedings, the respondents passed an order, which after stating the pleadings and evidence, concluded — “Whereupon it is considered and ordered by the said Mayor and Aldermen, that this board will proceed no further in the premises, and that the said respondents be hence discharged, and go thereof without day.” *Held*, that this was such an adjudication on the subject of damages as would entitle the petitioner to an appeal to the Court of Common Pleas, and that therefore a mandamus was not necessary to compel an adjudication by the defendants, and would not lie. — *Smith v. Mayor & Aldermen of Boston*.

Assault and Battery — (See Burden of Proof) — Evidence — License. Tort for an assault and battery. Defence in justification, that the acts complained of were done in self-defence, and in lawfully ejecting the plaintiff from a passage-way, the fee of which was in a church of which he was sexton, and which had authorized him by vote to take care of the building (which adjoined the passage-way) and property. The owners of estates opposite said building had the right to pass over said way, and the plaintiff claimed that he, being in company with a son of one of said owners, a license might be implied. To rebut this the defendant offered evidence that the house had a long time previous to the assault been frequented by boys of a bad character, some of whom had been sent to the State prison; that the plaintiff was one who had thus frequented said house, and that meetings for worship in the church had been frequently disturbed by them, and the windows of the church broken; and said owner had fastened the doors and windows of said house to exclude entry, and that it had been broken into; — which was objected to by the plaintiff, but

admitted. *Held*, on exceptions to the rulings of the court below, that the force employed in self-defence must be proportioned to the attack, and if this limit is exceeded, the person defending himself is liable for the excess; and the jury having been instructed that if, from the whole evidence, they were satisfied that the plaintiff committed the first assault, and that the assault set out in the plaintiff's declaration was defensive only, the justification was made out, and they should return a verdict for defendant, — that they should have been instructed, that before they could render a verdict for the defendant, they must find not only that the assault was committed in self-defence, but that there was no excess of force employed; and that on the question of license, it was proper to show that the house had been shut up by the owner, and had been frequented by certain persons, among whom was plaintiff; but that the evidence as to the character of these persons, and their having been in the State prison, was inadmissible. — *Brown v. Gordon*.

Assignment — See *Insolvent Debtors, Trustee Process*.

Banks — See *Promissory Notes*.

Burden of Proof — *Assault and Battery*. Indictment for an assault and battery on one E. with a dangerous weapon. Evidence was offered both by the government and the defendant. This evidence tended to show that the party assaulted had spit in the defendant's face, in a public place, immediately before the assault; and the defendant contended that he was justified in what he did thereby. The jury were instructed that the burden was on the government to satisfy the jury that the defendant did strike E. with a dangerous weapon, in the manner alleged in the indictment. If this were proved beyond a reasonable doubt, the burden was then on the defendant to satisfy the jury of the justification alleged, to wit, the spitting in his face. If not satisfied of the fact alleged in justification, but satisfied that the government had made out the allegations in the indictment as above stated, the verdict must be against the defendant. *Held*, that where the defendant in such an indictment relies on no distinct, separate and independent fact in defence, but claims that he is not guilty on the transaction in question itself, the burden of proof is on the government throughout; and that the fact that evidence is offered by him, if it is confined to that transaction, is immaterial, and the instructions above given were held erroneous; and the court were of opinion, although the exceptions did not raise the point, that spitting in the defendant's face was no justification of the assault alleged. — *Comm'th v. McKee*.

Conflict of Laws — See *Insolvent Debtors*.

Contract — *Action*. R. made written applications for insurance to a Mutual Insurance Company. The policies were made out, and he was requested to take them, sign the deposit-notes and pay the premiums, but refused to accept the policies, or sign the notes. The policies were never delivered to him, but had remained in possession of the plaintiffs, and he never had paid the premiums nor signed the notes; and an action was now brought for the premiums, deposit-notes and assessments. *Held*, that no contract was completed between the parties upon which the action could be sustained. — *Real Estate Mutual Insurance Co. v. Roessle*.

Estoppel — *Covenant* — *Damages* — *Evidence*. Action on a covenant against incumbrances. Defence, that after eviction the premises had been conveyed to the defendant, and that the title enured to the plaintiff. *Held*, that this was no bar to the action; that the measure of damages was the consideration-money, of which the consideration stated in the original deed was *prima facie* evidence, and interest. — *Blanchard v. Ellis*.

Evidence — (See *Assault and Battery*; *Estoppel*; *Promissory Notes*) —

Cross-Examination — Leading Questions. Assumpsit against C. as maker of four promissory notes, two signed by M. H. B., payable to plaintiff's order, two by J. F. payable in like manner; each indorsed by defendant, as follows—"Waiving demand and notice. S. C." The question on the trial before the jury was, whether he indorsed them at the making, and was liable as an original promissor, or subsequently, and so liable only as guarantor.

The defendant offered the deposition of one J. C. F., in which were the following cross-interrogatories, objected to at the taking and at the trial as inadmissible, to wit: "Were you not expelled from the Bar at Springfield? When was you expelled from the Bar? Did you have a hearing at your request before the court about the time of your expulsion, and with reference thereto, and was not your cause then reheard, and did you not address the court on the subject? What Judge presided at the court when you was expelled from the Bar at Springfield? For what cause was you expelled from the Bar? Did the same Judge preside at Springfield when you was expelled who presided at the former trial of this case? How long after you testified in the former trial of this case was it that you was so expelled from the Bar? What were the charges against you for which you was expelled from the Bar? Was you not expelled from the Bar because, among other things, you committed the crime of perjury? Did not Judge M. at or about the time you was expelled from the Bar speak to you about your testifying on the former trial of this case? Did he not intimate you had sworn falsely?"

The plaintiffs offered the deposition of M. H. B., to which the defendant objected that the interrogatories filed, and of which he had been notified, were for the deposition of M. H. B., of Jonesville, Wisconsin, laborer, and by the caption it was the deposition of M. H. B., Sandusky City, Ohio, peddler, at which last place the commission was executed. It was supposed that he resided in Wisconsin, but having removed to Sandusky, the commission was sent there and executed by an Ohio magistrate. Also that the deponent, without any request to him to produce original papers, or notice to the defendant that any would be shown to him, or he requested to annex any, was shown papers, testified in regard to them, and annexed them to his deposition: the papers referred to being the original notes sued on, as to which he stated that the annexed papers were "the notes about which I have testified." The defendant farther objected to the following interrogatories proposed by the plaintiff:

"Who introduced you to the plaintiff, and for what purpose? Did the person who so introduced you give to the plaintiffs any promise or encouragement as to the payment of goods? State all that took place or was said by Castles to the plaintiffs at the time of said introduction, or at any time when you have purchased goods of the plaintiffs. Did you give your notes to the plaintiffs for goods so purchased of them, and did the defendant indorse or sign or put his name on said notes? And if so, when? And state particularly, and when and where he so put his name on said notes. Please write out and annex, or have the magistrate write out and annex to your deposition, copies of the notes given by you to the plaintiffs, according to your best recollection and belief. What were the amounts of said notes? What their dates? State as near as you can recollect. State when said Castles put his name on said notes with reference to the time when you signed them — Did he put his name upon them when you put yours there, or at any and what other time?"

Held, that the cross-interrogatories objected to were inadmissible; that the objections to the deposition of M. H. B. could not avail; and that the form of the commission might be amended now to conform to the facts. It

was a mere question of identity, it was said, and both parties understood the deponent to be the same person they had known here; while as to the original papers, there was no controversy as to the signature, and the genuineness of the notes was not in question, the real question being, when the defendant's signature was appended, and it not being suggested, that any pertinent inquiry could be made as to the notes, if an opportunity were afforded. And as to the interrogatories, objected to as leading, they were not so in an objectionable sense as indicating the answer. — *Smith v. Castles*.

Insolvent Debtors — Assignment — Trustee Process — Conflict of Laws. — An assignment was made in New York by insolvent debtors, which was valid by the laws of that State, giving preferences to certain creditors, and including certain debts due from citizens of Massachusetts, who were summoned as trustees in an action against the debtors in Massachusetts. *Held*, that the express provision of Stat. 1838, c. 238, rendering such an assignment invalid, was still in force, and that the laws of New York could not make such assignment effectual; and the trustees were charged. — *Zipcey v. Thompson & Tr.*

Judgment — See *Appeal*.

License — See *Assault and Battery*.

Mandamus — See *Appeal*.

Pilots — Usage. Action for pilotage fees. Defence, that the plaintiff did not offer his services until after the defendant's vessel had passed the line described in Rev. Stat. c. 32, § 24, "from Harding's Rocks to the Outer Graves, and from thence to Nahant Head;" and that the plaintiff refused to carry her above a bridge in Charles River. The vessel had passed the line once, but on the next tack, standing northward, had recrossed it, and at the time of the offer was outside. *Held*, that the passage intended by the statute was a final passage, not merely a temporary and accidental one, and that the plaintiff was entitled to recover; *held*, further, that he was not bound to carry the vessel farther than the established usage of pilots required, and that an usage not to carry vessels above the bridge having been proved, his refusal so to do did not deprive him of the right to his fees. — *Hunt v. Carlisle*.

Promissory Note — Due Diligence — Agent — Banks — Evidence. Contract by the holders against the first indorser of a promissory note, dated at Boston. The note was left in a bank in Boston for collection. No demand was made on the maker, and the record of a protest by a deceased notary was offered in evidence of due diligence. The record states that he "went to various places making diligent inquiry of divers persons for the promisor. I could not find him nor any one knowing him, nor any one with funds for the payment of said note, thereupon I left official notice of the default addressed to the several indorsers at their respective places of business." The promisor had a house and place of business in Boston, and the indorsers also lived in Boston. *Held*, that after the decease of a notary his protest of a promissory note was competent secondary evidence, because it was an act done in the course of his duty and business. That the record was admissible in the same way in the absence of the protest. That the bank, as the plaintiff's agent, was bound to do all the plaintiff would have been bound to do, and that due diligence was not used to find the promisor, the presumption being that his place of residence was known to the indorsers, whose residence it appeared that the notary knew, while it did not appear that he inquired of them for the debtor's. — *Porter v. Judson*.

Sale — See *Trustee Process*.

Shipping—Owners and Charterers of Ships—Liability of. Action against F. as owner of the barque E. J. for water casks delivered on board on the order of the master. The barque was then chartered to the master and C. In the charter party were the usual covenants by the owner, that the barque should be tight, staunch and strong during the voyage, and sufficiently tackled and apparelled. The charterers were to victual, man and sail the ship. The charter party contained an exception of all necessary room for the accommodation of the crew, &c. There was no evidence of any direct authority from the defendant for the purchase of the casks. *Held*, that the owners for the voyage, not the owners of the vessel, were liable for supplies, and that by this charter party the charterers were owners for the voyage, the whole vessel being at their disposal, and they to victual, man and sail her; and that the exception of "necessary room," &c., did not affect this matter, as it was inoperative; nor the owners' agreement that she should be sufficiently tackled, &c., although water casks were necessary apparel—as this was an executory contract between other parties than those to this suit. — *Urann v. Fletcher*.

Statute of Frauds—Agreement not to be performed within a year—Action. H. verbally agreed with N. that his son, a minor, should work for N. until twenty-one, in consideration that N. would pay H. a certain sum quarterly during that time, as board, and a certain sum semiannually, as clothes money, until the son should arrive at eighteen, — to be afterwards increased. And this action was brought on the special contract for a sum becoming due two years after the agreement. *Held*, that under the statute of frauds, Rev. Stat. c. 74, § 1, cl. 5, no action can be brought on a verbal agreement unless it can be completely performed within the year, and therefore the present action would not lie. Whether an action would lie here on an implied contract, after the termination or waiver of the original agreement for the services previously performed, *Quære*. — *Hill v. Hooper*.

Trustee Process—(See Insolvent Debtors)—Sale. H. assigned to D. in trust for creditors who should sign the instrument of trust, certain goods under mortgage and attachment, and in the custody of a deputy sheriff, in the store of H., and also goods in the possession of K., a consignee of H., and some debts due H. D. accepted the trust, went to the store, and said he came to take possession of the goods, and took the account books. H. was sued and D. summoned as trustee, and after the service on D. the attaching officer sold the goods in his custody, and paid over a surplus to D., and D. took and sold the goods in the hands of K., who also paid over some money when he gave up the goods to D. No creditors became parties to the assignment before said service on D. *Held*, that it was competent for H. to convey his interest in the property mortgaged and attached without actual delivery; and that, on the facts, said interest passed to D., and he had a *quasi* possession of the goods sufficient to make him chargeable in this form of process, which it was further *held* would lie—but *held* also, that the moneys due from K. were a *chose in action* for which the trustee was not chargeable. — *Mann v. Huston and Tr.*

Trustee Process—Assignment. The city of Boston having been summoned as trustee, on account of moneys due the defendant for work and labor, a claimant appeared and claimed the fund under an assignment made before such work and labor was performed, of "all the claims and demands which I now have, or which I may have against the City of Boston on the first of January next, for all sums of money due and to become due to me for services, &c." The assignor had previously done work for the city, and thereafter worked for the same, but at the time of the assignment no contract or engagement existed between him

and the city, that they would employ him or that he should work for them, — and it was held that the assignment could not pass wages subsequently earned. — *Mulhall v. Quinn and Tr.*

Way — See Appeal.

Before MERRICK, J.

Exceptions — Practice — Stat. 1851, c. 261. In the action of B. v. W., W. filed exceptions to the rulings of the Court of Common Pleas, which were disallowed, and the case was removed to the Supreme Court to establish his exceptions. Stat. 1851, c. 261, provides that the truth of exceptions may be established if disallowed, and that the Supreme Court may prescribe rules in conformity with the act for settling the truth of the same. And it is provided by a rule of said Court, that the party excepting shall "file his affidavit, setting forth in full said allegations and all facts material thereto, at the term, &c., and shall give notice of said petition to the adverse party, by delivering a copy thereof to him or the attorney of record, ten days at least before said term." In this case W.'s counsel delivered to the attorney of B. a copy of the disallowed bill of exceptions, with this indorsement: "sworn to before me E. W. H., Justice of the Peace," with date of oath as usual, and below this certificate of the oath (which was added after the filing of the similar paper hereafter referred to) the words, "a copy of allegations and exceptions to be filed and proved under the statute of 1851." No copy of any other paper was served on B. or his attorney. The papers filed in the Supreme Court were (1st) a certified copy of the bill of exceptions, with a copy of this indorsement: "The foregoing exceptions not being found conformable to truth, are not allowed. D. W. Presiding Judge," with the same certificate of oath without date affixed, but without the words, "a copy of allegations, &c." above mentioned as on the paper given to B.'s attorney. (2d) A paper reciting the judgment of the court below for specified sums, as damages and costs and continuing then as follows: "And thereupon the said defendants, by their attorney, filed certain proposed exceptions which are reduced to writing, and on file, which being presented to the court, and not found conformable to the truth, are disallowed. And the defendant having filed in writing a notice of his intention to establish the truth of the allegations contained in his said exceptions before the Supreme Judicial Court, it is ordered that further proceedings be stayed." This paper was duly attested by the clerk of the court below. The plaintiff's counsel now filed his affidavit setting forth these facts, and moved that the court take no further cognizance of the case, contending that the proceedings had in the case were not such as the rule of the court required, but MERRICK, J. held otherwise, and overruled the motion. — *Bennett v. Whitney.*

Miscellaneous Intelligence.

A PARISIAN COURT — DAMAGES FROM THE BITE OF A DOG. Action for dog bites are not uncommon among us, but we can hardly expect that the following sketch from the "Gazette des Tribunaux," of a similar proceeding in Paris, will serve as an authority in our courts. It does not appear that it was held necessary, as at common law, to prove that the

dogs were accustomed to bite mankind. There is a pleasing piquancy in the testimony, which, however, may be the salad of a French reporter.

TRIBUNAL OF POLICE, PARIS, MARCH 17, 1854.

Nicholas Dumoulin. I and the dogs have always been good friends; I could never meet one without stopping and saying a word to him; but after what happened to me on the Boulevard Strasbourg with Monsieur Garit's dogs, I shall have nothing more to do with 'em.

The Judge. Why, what happened to you there?

Nicholas. I was trotting along home about 10 o'clock in the evening. I felt jolly after a good day's job, and so I was humming a little tune. When I came by a house that was building, I heard two friends say, "Good evening." They were two big Bordeaux fellows of Garit's, the wine-merchant, two chaps who could tear a man into bits in five minutes.

The Judge. You mean two Bordeaux dogs.

Nicholas. They said "Good evening" to me, just as I do to you. I very naturally returned the compliment, and pretty soon we got a-chatting. I fancied that my conversation entertained them; but when I was turning away, jump! went the two jolly fellows against the board fence between us, down with it, and, crack! they pounced on me like a Cossack. The red one caught hold of my leg, and the black one jumped at my face. Two such fleas you'd better believe it is not easy to shake off. Down I fall; but not being so well off on the ground as standing up, I get up again; but the two rascals pull me down again, and if I had'n't left them my cloak to tear to pieces they'd have given me the same sauce.

The Judge. What was the damage done?

Nicholas. Sick three weeks, lost my blood, my cloak, my cap, my cravat, and my labor, which I hav'n't had strength to go to yet.

A Witness. One doesn't sleep all night when he is seventy-two years old. I heard the dogs barking, and a man barking back, but faith! a poor bark he made of it though. Says I to myself, "There's a simpleton going to get nipped. A minute after I heard a cry, "Halloo! Halloo! Help! Help." Says I, "Good! good! you've caught it. I knew it."

The Judge. And didn't you go to the rescue?

Witness. When one is seventy-two years old, and has never meddled with other folks business, he would hardly begin with meddling with Garit's dogs.

The Judge. Are they bad ones?

Witness. I don't say that; I never saw them harm any one: but if they had got their appetite up to eat a fellow, they could very well finish two.

M. Garit. My dogs are as gentle as kittens, and besides, they were behind a fence.

The Judge. You ought to have seen that the fence was firm.

M. Garit. If the dogs hadn't been stirred up, they wouldn't have got out.

Nicholas. I didn't stir 'em up at all. They said "Good evening" to me, and I answered them. No harm in that! If they hadn't had a bad temper, I shouldn't have suffered.

The court being of opinion that M. Garit was guilty of negligence in not taking care to secure the fence, fined him twenty-five francs, and three hundred francs damages were awarded to Dumoulin.

EXTRAORDINARY SCENE IN AN INDIANA COURT—AN ELECTIVE JUDICIARY.—The Richmond Palladium, of last week, gives the following account of a very singular scene which occurred on the opening of the court in New Castle, Henry County, Indiana.

At New Castle, we found quite an excitement existing in regard to the President Judge of this Circuit, Hon. Judge Anthony. The court met on Monday morning, but before proceeding to business, a member of the Henry county Bar presented a petition, signed by every member of the bar in that court, asking in most respectful terms, his honor to resign his seat upon the bench. The gentleman who presented the petition, stated, however, that in a case he would not resign, the petitioners had agreed among themselves that they would not do any business in the court so long as he presided.

Another gentleman addressed the court, reasserting the determination they had agreed to, and urging in very plain terms the necessity of a resignation. Another followed, expressing the high personal respect he entertained for the judge as a gentleman and a *lavern-keeper*, but justice required him to say that he regarded the present incumbent of the bench as utterly unqualified for the place he occupied. He was followed by another, and he by another, and he by another, until every member had, in plain terms, expressed their opinion as to his incapacity, &c.

With a nonchalance peculiar to his honor, he told the gentlemen of the Bar that he would think of the matter, and in the mean time would proceed to business. He called the cases upon the docket, and every case which had not been compromised, was continued until the next term of the court. Court was adjourned for dinner, and in the afternoon a petition signed by the jury was presented to the judge, asking him to resign. His honor asked time to consider, when the lawyers proposed to him, that if he would agree in writing never to come to that county again for the purpose of holding court, and would send some one in his place, they would be content to drop the matter, so far as they were concerned. The judge again took the matter under advisement, and we are told, finally promised never to come to that county again for the purpose of holding court, until he should be sent for, and would either send some other judge to hold the court, or permit the judge of the Court of Common Pleas to hold court in his stead. So ended the matter for the present.

Not one word by way of justification of the course of the attorneys is required of us. All who know anything of the Judge will sustain the plea of full justification.

“BARRING-OUT” IN THE OHIO SCHOOLS.—The Ohio State Democrat publishes a reply of H. H. Barney, the State Commissioner of Common Schools, to a question proposed to him by a number of the citizens of Brown county, whether, on New Year's evening, scholars were legally authorized to bar the doors of their schoolhouses and resist the demand of the directors and teachers to open the same, unless a treat of two dollars should be granted them by the teacher? It seems that this mode of procedure on the part of the scholars has been practised from time immemorial; and on the last New Year's day, when the teacher of a school in Brown county refused to pay the sum, the boys were upheld in their demands by many of their parents and some of the magistrates of the county, and the teacher was at length obliged to comply. Mr. Barney was of opinion that the boys in such cases were trespassers, and liable to the same amount of damages as they would be at the suit of a private citizen, whose dwelling they should close against him with a view to extorting money.

COMMISSION ON CLAIMS IN LONDON. The Department of State, at Washington, has given notice that as erroneous interpretations prevail, to the effect that the Commission on Claims now sitting in London, will shortly adjourn to sit in the United States, it is proper to remind those

interested in the proceedings of the Commission that, by the terms of the convention under which it has been organized, London is the only place where its sessions can be held; that it was necessary for all claims embraced by the convention to be presented to the Commission by the 15th of this month, "unless, in any case where reason for delay shall be established to the satisfaction of the Commissioners, the period for presenting the claim may be extended to any time not exceeding three months longer," which time will expire on the 15th of June next. — *N. Y. Herald*, April 8.

NEW LIBEL LAW IN PENNSYLVANIA. A new law of libel is pending in the Legislature of Pennsylvania, which is of considerable interest to the publishers of newspapers. It proposes two important innovations upon the existing law. The first of these is, that in prosecution for libel, it shall be lawful for the accused to give in evidence any fact tending to prove the truth of the published allegations, and that the publication was made with good motives, and for justifiable ends, and was necessary for public information; and if these points be proven to the satisfaction of the jury, they shall acquit the accused. The second is, that the owner, publisher, or editor of a newspaper shall not be held responsible; criminally, for the malicious act of a person in his employ, unless it shall appear that the act was perpetrated with the counsel or consent, or at the suggestion of such owner, publisher, or editor. — *N. Y. Herald*, April 8.

JUDICIAL WIT. — At times the grave and sober proceedings of the Supreme Court of this State are relieved from that dullness, too often supposed to be their inseparable accompaniment, by the bright and salient humor of some one of "our learned brethren" of the bar. Even the respected occupants of the judicial bench themselves occasionally indulge in a passing encounter of wit. No one is usually more happy, in this respect, than the distinguished Chief Justice himself. An instance of this felicitous readiness occurred a few days since. The "learned counsel" in the case then pending, was dwelling, with all his ability, upon the universal and well established truth of the well known proverb, that if you give another an inch he will take an ell. "Yes," interposed his Honor, "and hence the origin of *Lynch law*." — *Boston Atlas*.

PUNCH defines a court-house as a place where a penny's worth of justice is purchased with a shilling's worth of law. There is only one thing less profitable than suing people, and that is going their security.

Notice of New Book.

THE LAW OF CONTRACTS. By THEOPHILUS PARSONS, LL.D., Dane Professor of Law in Harvard University, at Cambridge. Vol. I. pp. 776. Boston: Little, Brown & Company. 1853.

This volume has been for some time upon our table. We have delayed noticing it, in the expectation, that before this time the second volume, long since announced as ready for the press, would have been published,

so that by reading both volumes we could judge more fairly of the whole work. We propose now to do little more than to refer to the plan of the work.

The book is upon the vast subject of Contracts, the limits of which it is almost impossible to define; and in the treatment of it Professor Parsons has taken a wide range. It is only the first part of the work, and has professedly for its subject "The law of contracts considered in reference to the obligations assumed by the parties." A preliminary chapter discusses "The extent and scope of the law of contracts," and defines and classifies contracts. We should be disposed to criticise the definition of a contract, upon page five, where it is stated to be "in legal contemplation an agreement between two or more parties for the doing or not doing of some specified thing," although his reason for omitting the consideration is subsequently explained, were it not that on page eight, in speaking of the essentials of a legal contract, he describes them to be, first, the Parties; secondly, the Consideration, for this is, in legal contemplation, the cause of the contract; thirdly, the Assent of the Parties; and fourthly, the Subject Matter. These form the subjects of the several books into which the volume is divided.

Some three hundred and forty pages of the volume are devoted to the consideration of the subject of the first book, that is of Parties to Contracts. This is one of the novel features of the plan of the work. Usually authors have stated in a few pages, and in general terms, yet sufficiently particular, the ability or disability of a person to do a legal act, and devoted the rest of their work to a consideration of the subject-matter, or matters of their treatise. Professor Parsons has, under the head of Parties to Contracts, said all that he has to say upon the subject of several of the different species of contracts, and upon agency and partnership. This is perhaps not so objectionable, because all that is said of these special subjects is said in one place, and can be found without much difficulty. Yet in some cases this causes confusion. For example, in regard to the contract of marriage; in book first, — of Parties to Contracts, — we have, without a word being previously said as to who may contract to marry, or what the contract of marriage is, a chapter upon the contracts of married women, with three sections, one — "of the general effect of marriage on the rights of the parties;" a second, "of the contracts of a married woman made before marriage;" (we do not well see how the contract of a woman before marriage, can be the contract of a married woman) and a third, "of the contracts of a married woman made during marriage." In the subsequent part of the volume, in book third — of the subject-matter of contracts — we find another chapter upon "Marriage." We think it would have tended more to simplicity and perspicuity, had the whole been put together under this last chapter, where it more properly belongs.

We notice also that the author has not followed the practice of the late Judge Story and Professor Greenleaf, in numbering the several paragraphs or sections, and referring to these sections instead of to the pages. Where a book reaches but one edition, these two modes of reference are equally convenient. But in a book like this, which we do not doubt will reach many editions, and will, in each issue, receive such additions as will make an alteration of the paging necessary, this will constantly cause confusion in citations. But when a book is divided into sections, and in subsequent editions alterations are to be made, it can be done under the same number of the section, the additional sections being indicated by different letters of the alphabet; and thus no confusion can arise in citations from the several editions.

The objections which we have made are chiefly to the arrangement of the work. In its execution the author has stated in the text only the principles of the law, and has not incorporated therein the statement of any adjudged case. But the leading decisions are all carefully collected in the notes, and are cited at sufficient length. This work has evidently been done with great labor, care and exactness; and whoever purchases the work, will have the substance of the law, upon the subjects discussed therein, that is contained in the volumes of the library of the Law School at Cambridge. We look forward with interest to the appearance of the second volume, and when it is published we propose to refer again more fully to the entire work.

Insolvents in Massachusetts.

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Commissioner.
Adams, Warren	Worcester,	March 20,	A. H. Bullock.
Alexander, Alexander	Boston,	" 13,	John P. Putnam.
Bailey, Benjamin F.	Boston,	" 23,	John M. Williams.
Bates, Nahum	Heath,	" 24,	David Aiken.
Carrier, David	Huckland,	" 7,	David Aiken.
Davis, Elzaphan	Danvers,	" 13,	John G. King.
Donaldson, Alexander et al.	Dorchester,	" 6,	John P. Putnam.
Dow, Everett	Quincy,	" 8,	Samuel B. Noyes.
Draper, Milton M.	Attleboro,	" 14,	E. P. Hathaway.
Durant, George T.	Palmer,	" 13,	Henry Voss.
Fisher, Freeman	Dedham,	" 29,	Francis Hilliard.
Flagg, Seth	Northboro,	" 4,	A. H. Bullock.
Frost, Eben H.	Boston,	" 10,	John M. Williams.
Gillison, John W. et al.	Danvers,	" 20,	John G. King.
Garley & Farley	Danvers,	" 14,	John G. King.
Heath, Benjamin	Boston,	" 6,	John M. Williams.
Hillman, John	Hawley,	" 3,	David Aiken.
Hobbs, Nathaniel et al.	Danvers,	" 20,	John G. King.
Holt, Charles S. et al.	Boston,	" 14,	John P. Putnam.
Hopkinson, Edwin	Groveland,	" 3,	John G. King.
Kimball, Moses	Melrose,	Feb. 10,	Josiah Rutter.
Kirkham, Albert H.	Springfield,	March 21,	Henry Voss.
Lambert, David P.	Boston,	" 27,	John P. Putnam.
Littlejohn, William	Coleraine,	" 17,	David Aiken.
Longley, James A.	Westboro,	" 13,	A. H. Bullock.
Lucas, James M.	Boston,	" 7,	John P. Putnam.
Mann, Henry A.	Dedham,	" 24,	S. B. Noyes.
Munroe, Franklin, et al.	East Bridgewater,	" 24,	Welcome Young.
Munroe, William H. et al.	East Bridgewater,	" 24,	Welcome Young.
Noyes, Cyrus	Acton,	" 18,	Josiah Rutter.
Peck, Augustus E.	Boston,	" 16,	John P. Putnam.
Pratt, Cyrus N.	Charlestown,	" 14,	Asa F. Lawrence.
Reed, James B.	Cambridge,	" 23,	John P. Putnam.
Richardson, Jonas K.	Malden,	" 18,	Isaac S. Morse.
Scribner, Elbe	Charlestown,	" 27,	Josiah Rutter.
Sibley, Rudacy	Boston,	" 6,	John P. Putnam.
Spinney, John	Lynn,	" 18,	John G. King.
Stockpole, Joseph et al.	Danvers,	" 20,	John G. King.
Stockbridge, Walter K. et al.	Cambridge,	" 14,	John P. Putnam.
Swaeney, Naaman G.	Lowell,	" 31,	Isaac S. Morse.
Taylor, John E.	Springfield,	Feb. 8,	Henry Voss.
Thomas, Warren B.	Charlestown,	March 7,	Isaac S. Morse.
Tucker, Dexter M. et al.	Boston,	" 4,	John P. Putnam.
Tucker, Benj. E. et al.	Boston,	" 4,	John P. Putnam.
Voss, Isaac	Princeton,	" 24,	Henry Chapin.
Willis, Samuel A.	Sudbury,	" 10,	Josiah Rutter.
Winkley, Swain et al.	Boston,	" 6,	John P. Putnam.
Woods, Leander	Leominster,	" 6,	A. H. Bullock.

THE

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RECENT LEGISLATION IN MASSACHUSETTS.

"If I am asked a question of common law, I should be ashamed if I could not immediately answer it; but if I am asked a question of statute law, I should be ashamed to answer it without referring to the statute book." If the author of the Institutes of the Laws of England could say this, the man who knew more not only of the common, but of the statute law, than any one of his time; when the sessions of parliaments were less free and less frequent than those of American legislatures; and when the judges made more law, and legislative bodies less, than now; with what modesty and timidity should we venture to speak of that yearly increasing accumulation of enactments which form our statute book, and which the pleasing fiction of the law supposes us, in common with our fellow citizens, to know and understand? What would Sir Edward Coke have said when called upon to acquaint himself with some two hundred statutes, the annual growth of our fertile soil, the yearly offspring of our fruitful legislatures, which seem to increase and multiply by laws as regular and as sure, as corn or cattle after their kind?

Another session of the Legislature of Massachusetts has closed within a few weeks, and has left us its usual consequences, — a large blue volume in prospect, a pamphlet of diminished size and minuter type, which is supposed to convey to the minds of the million the enactments which affect their property and liberty; and the more accurate

and useful edition of the laws which private enterprise annually provides for the profession.

The session commenced on the fourth day of January, 1854, and closed actually on Saturday, the 29th of April, 1854, outstripping the pay-roll of the members, which lagged along, according to the usual custom when an adjournment takes place on Saturday, until Monday the first of May. Out of this session of one hundred and sixteen days, those which our legal abbreviation designates as *dies non*, reached the number of only eighteen, leaving ninety-eight working days; and during this time four hundred and fifty-four Acts, and eighty-six Resolves, were passed. Of these acts, some three hundred and sixty, including acts of incorporation, are private or local in their character, of but comparatively little interest to the public at large; so that the real addition to the current law of Massachusetts is not so appalling as the mere statement of the number of additional acts would lead us to apprehend.

The session was shorter than any for many years past, and the number of statutes larger than those of any session since the establishment of the government. The members have been quiet and industrious. The party generally dominant in this State has had an ample majority, and will probably admit its responsibility for the measures it has accomplished.

In stating the aggregate of their labors, we must not omit to mention the adoption of seven separate articles of amendment to the Constitution, which we shall presently consider more fully.

The large proportion of private acts which we have mentioned, cannot but provoke the inquiry, whether it is necessary or desirable for a legislative body to devote so much of its time to subjects of this nature. An act of the legislature helps every thing, and cures every thing. We confess ourselves advocates of general laws, wherever they can be made applicable; and perhaps a computation of the time and money expended on the two hundred and ninety acts, more or less, establishing new corporations, or relating to corporations already existing, would furnish no insignificant argument in their favor. Many of these, no doubt, would be necessary on any system, but it would be a reproach to the fruitful ingenuity in legislation which characterizes America, to say that some safe and convenient system could not be devised, by which much that now requires the special interposition of cumbrous and expensive

legislative machinery, might be done by the parties interested with greater ease, convenience and safety. Mr. Whitworth, one of the English commissioners on the Industrial Exhibition at New York, states in his report, in speaking of the subject of limited liability — “The cost of obtaining an act of incorporation is very trifling; in one case, when the capital of the company amounted to \$600,000 (120,000*l.*), the total cost of obtaining the act of incorporation was fifty cents (2*s.* 6*d.*);” — a sum which must have seemed frightfully minute to an Englishman familiar with parliamentary expenditures. We do not propose now, however, to fight over the battle which was so vigorously fought at the penultimate session of the Massachusetts legislature, in the discussion upon the incorporation of banks. We only wish to call the attention of our readers, in this connection, to the large number of acts of this kind. Nor can we forbear a word upon the great increase of banking capital at this and the previous session. The banking capital of Massachusetts was increased at the session of 1853 by an addition of \$8,510,000, besides \$2,000,000 granted to the Merchants Bank, subject to the limitations imposed by the acts of 1851 and 1852 in regard to the business of banking; limitations which, so far as we are aware, were not imposed on other banks, and which in this case proved practically inoperative.¹ At this session a further increase of the banking capital of the State of about six and a half millions of dollars has been authorized, making an increase in two years, including the two millions of dollars granted to the Merchants Bank, of about seventeen million one hundred thousand dollars. It would appear indeed that \$750,000, at least, of the increase authorized last year, was declined, and it is not yet certain how much will be taken up this year.

On the first Monday of April, 1853, the aggregate banking capital of this State, on which a tax was paid, amounted to \$43,270,000; on the first Monday of October in that year, to \$51,174,450. The report of the joint standing committee on banks, at the last session, states that “The present amount of bank capital in use, and authorized to be used, in the State, is fifty-two millions eight hundred and eighty thousand five hundred dollars, (\$52,880,500.) The whole amount of new capital, that the committee,

¹ See the Bank Commissioners' Report for 1853, Appendix, I, p. 61.

acting under the rule before mentioned, have felt obliged to recommend to be granted, is between six and seven millions." A further increase of one hundred thousand dollars, in addition to that recommended by the committee, we believe, was authorized; so that we may now state the present amount of bank capital in use and authorized to be used, at about fifty-nine million three hundred and eighty thousand five hundred dollars.

We do not claim the ability to estimate the financial wants of the present age, but if any thing is to be feared from an expansion of credits and an enlarged paper currency, some might think the way was open for them and their attendant evils.

The laws of this year, like those of others indeed, contain evidence of the negligence and carelessness with which enactments, of material interest to the public, are sometimes suffered to straggle into the world. We do not know at whose door the fault is to be laid this year, nor do we undertake to say that those, whose office it is to guard against such things, have not exercised all the care which is customary or can be expected. The fault may be in the system, rather than in individuals. The proverb tells us whose business everybody's business is; and when labor and responsibility are distributed among the members of so large a body as the legislature of Massachusetts, it would be obviously most invidious and unjust to attribute errors in legislation to individual members, without the best evidence that they were actually responsible. Perhaps each member can bear, without wincing, his one three hundred and fiftieth part of the responsibility.

Without undertaking to point out all the defects of this kind in this volume of the laws, although we do not think many of importance have escaped our notice, we will mention, generally in the order of their occurrence, those which seem to deserve attention.

The sixth section of the sixtieth chapter, being an act to establish a police court in the town of Milford, provides that "A court shall be held by said justice at some suitable place, &c., to be provided at the expense of said Court." Some sharp eye, however, caught sight of this before it was too late to spread the healing wings of the legislature over it, and chapter 129 provides that it shall be provided at the expense of the town. The unfortunate justice of the police court of Plymouth must pay his own

rent (Ch. 312, § 6), and the justice of the same tribunal in Roxbury must hold a court every day in the week except Sunday, disregarding even the time-honored holidays of Massachusetts, Fast and Thanksgiving. (Ch. 249, § 8.)

Chapter 97 enacts, that "The salary of the assistant librarian, and the clerk of the secretary of the Board of Education, in addition to his present salary, shall receive the sum of one hundred dollars, &c." Who is this new officer here entitled "*The Salary* of the assistant librarian and the clerk of the secretary of the Board of Education?" We believe the assistant librarian is clerk of the secretary of the Board of Education, although the phraseology here used might perhaps lead to the impression that two officers were intended.

Chapter 322 provides that "All transitory actions, &c., which by the fourteenth section of the nineteenth chapter of the Revised Statutes, are required to be brought in the county where one of the parties lives, may be brought, &c." The chapter intended was undoubtedly the nineteenth; but the same error is made in the following section, which enacts that "So much of the fourteenth section of the nineteenth chapter of the Revised Statutes as is inconsistent with this section, is hereby repealed." This, however, is obviously an error which might have been easily made in copying, and as chapter nineteenth, section fourteenth, relates to water fences, probably no inconsistency will be found between it and the new act.

A mistake of a similar, but we should fear, from the difference in the phraseology, of a more serious character, was made in the year 1844. Chapter 156, of the acts of that year is, "An act for the preservation of grouse or heath hen," to which subject chapter 170 of the acts of 1837, also relates. The fifth section of the first mentioned act, is as follows: "The one hundred and seventeenth chapter of the acts passed in the year one thousand eight hundred and thirty-seven, and the seventh chapter of the acts passed in the year one thousand eight hundred and forty-one, are hereby repealed." Stat. 1841, c. 7, relates to the grouse or heath hen; but Stat. 1837, c. 117, is "An act to incorporate the proprietors of the Protestant Episcopal Church in Andover."

So far as we are aware, the effect of this upon the charter of that corporation has never been the subject of judicial decision. It would seem desirable that the error should be corrected, if indeed it has not been already

guarded against, before it involves them in any awkward consequences.

Section fifth, of chapter 406, is as follows: "When any man shall die, having lawfully disposed of his estate by will, and leaving a widow, the widow may at any time within six months after probate of the will make her election to waive the provisions of the will: and she shall in such case be entitled to such portion of the real and personal estate as she would have been entitled to if her husband had died intestate." This is part of a statute entitled, "An act in relation to the descent and distribution of the estates of *intestates*." That is immaterial, indeed. Not so, however, is the fact, at least as illustrating the subject upon which we are remarking, whatever may be its legal effect, that chapter 428 contains the same enactment almost *totidem verbis*, together with the following proviso: "Provided, however, that the widow shall not in any such case be entitled to receive more than ten thousand dollars out of the personal estate." These acts were approved by the governor on the same day. Both therefore went into effect at the same time. Each modifies the provisions of law previously in force; and it may be that they will be construed as one act, and that no difficulty will arise from this circumstance. We do not assume to pass upon the matter.

In chapter 453, containing a revision of the laws upon insurance, there are some errors, probably clerical; one of which, however, is a little awkward. Section 36 enacts, that "If insurance is made by a foreign insurance company, without complying with the requisitions of this act, the contract shall be valid; but the agent making the insurance shall be liable to the penalty provided in the thirty-ninth section of the act." That section provides, "That any person who shall procure payment, or any obligation for the payment, of any premium for insurance, by false or fraudulent representations, shall be punished by fine, not exceeding one thousand dollars, or imprisonment not exceeding six months for each offence." While section fortieth, to which it was undoubtedly intended to refer, imposes a pecuniary penalty not exceeding five hundred dollars, on "any agent making insurance in violation of this act or any law of this Commonwealth."

The following choice sentences may perhaps properly form part of our collection of "The Beauties of the Statutes of the year 1854."

"When any person upon any conviction . . . shall be sentenced to pay a fine, or ordered to pay any penalty or forfeiture, . . . or upon claiming an appeal shall fail to recognise for his appearance at the court appealed to, and there to prosecute his appeal, and to abide the sentence or order of the court thereon . . . and upon not paying the fine, penalty, or forfeiture and cost so assessed upon him, he shall be committed to prison, &c." (Chap. 257, § 22.)

"If the secretary or treasurer of any mutual company, unreasonably neglect to collect an assessment made by order of the directors and to apply the same to the payment of the claims for which they were made, he shall in his private capacity be liable for the amount of the assessments. (Chap. 453, § 19.)

"No foreign insurance company, by their agent in this Commonwealth, shall insure property in this Commonwealth . . . unless the capital stock of the company amounts to one hundred thousand dollars, all of which sums which shall have been paid in and invested exclusive of stockholders' obligations of any description and the debts of the company." (Chap. 453, § 31.)

We are told — indeed we think there can be no doubt of the statement — that there is one statute upon the rolls which contains a provision rejected by both houses — rejected we mean, when the bill was actually passed upon by them — although as it is upon the rolls, it was, doubtless, contained in the act when passed to be enacted after engrossment. Fortunately it is not a matter of much importance, although it is disagreeable to find that a record, which in the language of the law, imports an absolute verity, should be in reality false. Chapter 452, section 4, in relation to the enlargement of the State House, enacts that "The commissioners heretofore, or who may hereafter be appointed under the provisions of the act relating to the enlargement of the State House, approved, &c. in conjunction with the committee on public buildings of the present house of Representatives are hereby authorized," &c., and the following section again reads, "The said commissioners and the said committee are hereby authorized," &c.

In the Senate, objection was made to joining the committee on public buildings with the commissioners for the purpose stated, and that body voted to amend the bill accordingly. The House at first refused to concur in the

amendment, but finally receded and assented to it. And the bill was subsequently passed to be enacted without being amended conformably to the concurrent action of the two houses.¹ This, as we said, is immaterial in itself. But what security have the people, that the same thing has not occurred in other cases. It is not without parallel, however. Some three or four years since a bill was brought before the House relating to a railroad corporation in which the State was interested. A member proposed an amendment designed to protect the interests of the State. That amendment was opposed, scouted, and decisively rejected. But without other action upon it, except that necessarily implied by the fact we now state, it was contained in the bill when it passed to be enacted; and to the entire surprise of the mover, it appeared in the laws of that session, and still survives on the statute book a monument of legislative negligence.

In 1852 the section of the Practice Act, relating to the time within which answers must be filed, slipped out in some way, and to this day, although the Court of Common Pleas have passed a rule upon the subject, there is no express provision, so far as we are aware, to compel the filing of an answer in the Supreme Court before the moment of trial. It might be held, indeed, that it must be filed in a reasonable time, or the storehouse of the law may furnish some other resource for such a defect. That would not justify, although it might remedy the omission.

Eternal vigilance is said to be the price of liberty. It certainly is so, if without it we are subjected to laws which our representatives not only have not passed, but have refused to pass. We do not know how the accidents of this year have happened. Crowding business to the end of a session; hastening to close it; reading bills by their titles; suspending the rules, &c., are not favorable to accurate legis-

¹ The opinion has been expressed that the House Committee ought not to act under these circumstances. If by declining, they would simply deprive themselves of the slight emolument attached to the services to be performed, there might be much propriety in the suggestion; but, with deference to those who entertain this opinion, we venture to ask what authority the commissioners have to act alone under the statute as it stands? Authority is given to them "in conjunction" with the committee. Have they any more power to exercise that authority alone, than one of two referees to make an award without any action by the other, or either body of the legislature to choose a senator in Congress, if the other should refuse to act?

lation. We do not say that these things characterized the late legislature. It is conceivable, however, that they may have been incidents of a session unusually short.

A gentleman tells us, that hearing of the passage of a bill in which he was interested, he applied to members of the legislature for information in regard to it. They knew nothing of it. He went to the committee. They said such a statute had passed, but with some amendments; they did not know just what. He examined the bill as printed for the use of members in the house-documents, and found it quite a harmless affair. But going to the office of the secretary of state, he found it engrossed, passed, and signed by the governor, changed in its most essential features, and most felicitously adapted, as he thought, to the use of certain corporations whose necessities required special legislation, at the expense of a confiding community. He pointed out the provisions of the bill as passed to the committee and several other senators. They were astonished, and could with difficulty believe that such a thing had become a law.

“The thing itself was neither rich nor rare,
They wondered how the devil it got there.”

Where a bill has crept through both branches of the legislature, or when some accident has thwarted their will, still, “*legis habet vigorem*,” and, the remedy must be sought where the evil had its birth. But in cases like some of those we have mentioned, where a statute comes limping into court, deformed from its birth, it becomes necessary, to borrow an expression we have heard attributed to an able judge of a Massachusetts’ court, to “expound” it.

Where a legislature has apparently stultified itself, judicial ingenuity must be exerted to devise some mode of protecting its constituents.

We should be glad to see the experiment tried in this State of a permanent Board, whose duty it should be to consider and revise Bills proposed for enactment, and report them to the legislature with such suggestions as they saw fit, with regard to the modes of expression best adapted to accomplish the object designed, to their constitutionality and to their bearing upon other existing statutes or principles of law; and finally to superintend their engrossment. Judiciary committees, and committees on engrossed bills, &c., are very well; but it is not to be expected that they

can take the place of such a commission. The science of legislative expression is one of no small difficulty and importance. Questions upon the construction of statutes occupy much of the time of the courts, and lead to no little legislation. No one doubts that much of this could be avoided by greater care in the preparation of laws, and we think few will doubt that much would be gained in this respect by the mode we suggest, while it would be difficult to suggest any evil which would necessarily result from it.

Not so much of novelty in principle or importance in practice has been added to our stock of laws during this session, as at some others. Without undertaking to give even an abstract of what has been done, we propose to devote a few pages to a cursory review of some things which seem to us worthy of notice.

I. The first of the laws relating to crimes and punishments is one in relation to false pretences, providing that a person obtaining goods, &c. by way of purchase, by means of a false pretence relating to his ability to pay, when payment is not to be made on delivery, is not punishable, unless the pretence alleged is in writing and signed by him.

It is to be feared that indictments for this offence have been too often set on foot merely as a means of collecting a debt. It is certainly desirable to guard against injustice by a misapplication of criminal process; and if this statute tends to the accomplishment of that object it will be of service.

Certain fines and forfeitures are made recoverable in the name of any police officer, others in the name of the city marshal, or other principal police officer.

There are acts concerning truants in the city of Boston; concerning the furnishing of liquors to persons in custody; relating to lunatics, &c. confined in any jail or house of correction; imposing penalties for the destruction of beach grass, &c., and for destroying cranberry vines or picking cranberries out of season, on the Province lands in Provincetown; and relating to the unlawful use of private property. The last is an act making it criminal to wilfully take away, without intent to steal, a horse, or other animal left in the street, &c. without permission. It may be a great annoyance to have one's horse drove off even without the aggravation of theft; but practical jokers hereafter, if they omit to read the statutes may find themselves liable under this act to six months in the house of correction.

Separate criminal terms of the Court of Common Pleas are established in the county of Bristol; justices of the peace are empowered to punish breaches of the peace, (Rev. St. c. 85, § 24,) by imprisonment, and to add the costs of prosecution thereto; timber is protected, also the property of the Humane Society, by certain penalties; railroads prohibited from obstructing streets with their carriages; penalties imposed for false certificates by witnesses of travel and attendance; provision is made for the disposition of nursing or pregnant female convicts; also for an inquiry and presentment by a jury of six men where a fire has occurred, supposed to be the result of design, with regard to its cause. Finally, one may now have and use billiards, cards, &c. for any other purpose than gaming, without danger, unless they use them on Sunday.

II. The law of real estate was modified in some particulars. The first statute relating to this subject which we notice, is one providing for the partition of water rights, mill privileges, and other incorporeal hereditaments.

Another, which seems to belong to this class, is one relating to mill and reservoir dams, providing for their compulsory alteration when dangerous to property or likely to damage roads or bridges.

An act relating to sales under powers in mortgage deeds, is of considerable importance. Provisions on this subject were introduced in the first New Practice Act, (Stat. 1851, c. 233,) but omitted in the revision of that statute, (Stat. 1852, c. 312.) This act provides for judicial proceedings to carry out the power, and will perhaps render these securities more satisfactory and effectual than heretofore.

We have already had occasion to notice in another connection the act relating to the descent and distribution of the estates of intestates. It is of much importance to a class of the community which the gallantry of the common law of England has been said to favor.

By this act, widows of intestates dying without issue, are entitled to one-half of their real estate during life, and if the whole or any part so coming to the widow is wild or wood land, she may use, clear and improve the same as her husband might if living. This statute makes other important provisions in regard to personal estate of an intestate dying without issue; the residue of which, deducting debts, the expenses of the funeral and of settling the estate, if not more than \$5000 in value by the ap-

praisement, goes to the widow ; if more than \$5000 and less than \$10,000, she receives \$5000 ; if it amount to \$10,000 or upwards, she is entitled to one half, without being deprived by the act of her articles of apparel or ornament, or provisions or necessities given her by Rev. Stat. c. 64, § 1. These provisions for the widow are to be in lieu of her dower, at her election ; and she is presumed to elect to take under the act, unless she files in the probate office, within six months of the date of the letters of administration, her election to claim dower instead. After this comes the section upon the duplication of which we have already commented.

III. Railroads are now a regular and distinct subject of legislation.

The first public act of the session, is one authorizing the Supreme Judicial Court to restrain railroad corporations, by injunction, from entering upon and using lands or other property for any purpose except making surveys, when they have not given security for damages and costs according to Rev. Stat. c. 39, § 61. They are required to give checks to passengers for their baggage when requested, and to deliver it up on surrender of the checks, under a penalty of ten dollars for each violation of the act. Chapter 134, in substance, extends the time for payment of the State loan to the Norwich and Worcester Railroad, until 1877 ; and provides for a sinking fund, &c., while a subsequent act relates to this fund, and to the commissioners who have charge of it. Chapter 286, as some will think, should be entitled "An act to facilitate the borrowing of money by railroad corporations at usurious rates of interest." Any railroad company, established by the laws of this State, if authorized by a majority of votes at a meeting of the stockholders called for that purpose, may issue bonds not exceeding the amount of capital stock paid in by the stockholders, to fund its floating debt, or for money which it may borrow for any lawful purpose. The bonds must be for at least \$100 each, payable in twenty years or less, at not more than six per cent. They must be included in any subsequent mortgage, must be approved by one or more of the finance committee of the corporation, or some other person appointed for the purpose, who is to certify that the bond is properly issued and recorded on their books. And the last section provides that all bonds or notes which have been or may be issued by any railroad corporation, shall be

binding and *collectable* in law, though negotiated and sold less than par. Fortunately, no penalty compels us to conform to statutes as models of good English, or we should petition for the repeal of this last section, or the rejection of such a word as "collectable." Nor will we stop now to raise legal questions. Perhaps they will raise themselves fast enough, and we leave it to those more interested in the subject than we are, to animadvert upon this throwing railroads into the money market to borrow money at any rate of interest, if indeed the statute be considered to place them on a different footing from that they formerly occupied in this respect. It does not by its terms exempt lenders from the penalties of usury, and it is at least questionable whether that effect will be accomplished by it, if intended.

The act prohibiting the obstruction of streets by engines and cars, has already been mentioned. Chapter 401 authorizes county commissioners to alter the location and construction of gates at crossings, on petition of any party, when in their opinion required for the security of life, or the convenience of public travel.

Chapter 418 relates to the time of payment of damages for lands taken for railroads, and authorizes them to withdraw locations under specified circumstances. They are required by another act to give specific information in relation to mortgage debts in their annual reports.

IV. Banks in Boston are required to make weekly, those in the country monthly, returns to the Secretary of the Commonwealth, which he is to publish at the same intervals. The annual returns must be made up to 7 o'clock, P. M. of any Saturday the Governor shall designate, and need not distinguish certain different classes of bills. Money loaned by a bank to the Commonwealth, is not to be deemed debts due the bank within Rev. Stats. c. 36, § 9.

V. There are some things to be noticed, in regard to proceedings and practice in suits at law, not already mentioned elsewhere.

Transitory actions may be brought where either party has his usual place of business, as well as in the county of his residence, — a convenient alteration of the law. Witnesses, inducing the commission of an offence for the purpose of testifying in regard to it, may be refused their fees, at the discretion of the presiding judge or magistrate. Sheriffs and others selling liquor under order of court, are protected from the penalties of the liquor law.

An act relating to actions at law, provides that "The court before whom any action is brought, may, at any time during the return term of the writ, for good cause shown, and upon suitable terms, allow the plaintiff to file his declaration; and in all cases the declaration may be filed upon the entry of the action, unless an arrest of the person is made. And no action shall be discontinued when the declaration is filed in accordance with the provisions of *this* act, notwithstanding the provisions of the 8th and 9th sections" of Stat. 1852, c. 312.

A question of construction may be raised on this: May a declaration be filed under it when an arrest is made, or do the words "unless," &c., apply to the first clause of the act?

Arrests are prohibited in actions of tort, without an affidavit by the plaintiff or some one in his behalf, that the cause of action set forth in the writ is just and true.

In this connection may be mentioned the change to Pittsfield of the courts now holden at Lenox, if approved by a majority of the voters of Berkshire county.

VI. The insolvent laws have not escaped the notice of the legislature. Commissioners on the insolvent estates of deceased persons are to give written notice of their meetings to all known creditors, by mail or otherwise, seven days before the time of holding such meetings, and executors and administrators are to furnish them with a list of creditors and their places of residence so far as known, fourteen days before their first meeting. When a second or third meeting of creditors has not been duly called within the time prescribed by law, it may be ordered by the Supreme Court, and upon the death, resignation, neglect or absence from the county of the assignee, whereby any meeting to be called or notified by him, is liable to be defeated, such meeting may be called or notified by the clerk on the order of the commissioner.

The schedules of creditors and assets are not to be delivered to the assignees, but to the clerk; and the messenger's warrant must be directed to the sheriff of the county, or either of his deputies. Poor debtors, too, may be discharged without paying fees, on satisfying the justices of their inability to pay them, and in that case they are to be paid by the county. And the ninth section of Stat. 1844, c. 154, which excludes the debtor from the benefit of the act containing it after service of a *scire facias* on his bail in the original action, is so far amended that the debtor is entitled

to the benefit of that act if he pay or tender to the plaintiff or his attorney, or lodge with the keeper of the jail, to which he is committed, the costs of such *scire facias*.

VII. Police Courts have been established in Haverhill, Milford, Blackstone, Roxbury, Adams, Plymouth, and Cambridge. This has given us several different acts, containing a good deal of repetition, which might have been saved by uniting them. Cannot a general act be passed for the establishment of courts of this kind in all towns who shall desire them, on a basis to be prescribed? Trial justices did not seem to satisfy the people. But some general and uniform system is better than this multiplication of special enactments.

VIII. Among the miscellaneous acts is one of importance in regard to commissioners of deeds in other States. Their number is limited to ten in each city or county; their term of office to three years, unless sooner removed by the governor; and the act requires that they shall take an oath of office, and provide a seal, &c.

Probate courts, authorizing the adoption of a child, may decree a change of its name at the same time. A party to whom head money paid for an alien passenger has been repaid, or whose bond has been cancelled, is made responsible on the return of such passenger within five years, as if a bond had been taken and not cancelled. There are statutes relating to the militia, to certain State establishments, to county commissioners, to the school fund, and superintendents of schools; clergymen's visits to prisoners, and visiting at the State prison. Plurality laws were passed in regard to city, town, and county officers, and representatives to the Congress of the United States.

Massachusetts consents to assist in the erection of a monument in commemoration of the Declaration of Independence, at Philadelphia. A State tax of \$300,000 was laid; and the Hoosac Tunnel made its way through both houses. If its passage through the mountain is effected with equal facility, it may disappoint both its friends and its enemies. Provision was made for the annexation of Charlestown to Boston, if the voters of both consent, and the city charter of Boston was modified.

No less than nine public statutes relate to the salaries and compensation of various officers and servants of the State, with regard to which the legislature has displayed decided liberality. We are glad to see the compensation of the Executive made to correspond more nearly to the

dignity of his station than before; and also glad that the legislature had the good taste to make the commencement of this change a compliment to our present chief magistrate.

The ninth section of the general law for the organization of corporations for manufacturing and other purposes, required an annual certificate showing the amount of stock paid in up to the first of December preceding, to be filed in the month of January of every year.

That certificate may now be filed at any time, but must contain the statements required as to the condition of the company, on the first day of the month next preceding that in which it is made. Another section of this act, of more questionable policy provides, that the twenty-second section of the thirty-eighth chapter of the Revised Statutes, imposing a personal liability on the stockholders of manufacturing corporations when the notice required by this section is not published accordingly, shall not apply to corporations organized under the statute of 1851.

Two acts of importance remain to be noticed. The first is chapter 453, which contains the revision and modification made by commissioners, for whose appointment provision was made at the previous session, of the laws relating to insurance.

We should have been glad to see the commissioners or the legislature adopting a suggestion of the Chief Justice of Massachusetts in his opinion in the recent important case of the Lechmere Bank. (See the 16th volume of this journal, p. 517.) "One clause in the general laws above cited (Rev. Stat. c. 44, § 3,)" he remarks, "authorizing any one of several persons named, to fix the time and place for the first meeting, on the regularity of which all its future meetings depend, seems to open a wide door for difficulties, especially when different parties in a corporation are struggling to gain an undue advantage—one might fix one time and place, and another another, and several meetings and organizations might be had, and it would be difficult to decide which would be regular, although it is certain that one of them only could be upheld. Perhaps upon further consideration, the legislature may perceive the importance of providing by more accuracy and precision in their enactments, against any such difficulty in future." This very section is repeated almost in the same words, in the commencement of the statute upon which we are commenting.

The last chapter of the acts of this session is, An Act to authorize the business of Loan and Fund Associations, and authorizes the formation of corporations for the purpose of accumulating a fund to be lent on real estate security, or divided among its members. The fund is to be lent on real estate security only, "and upon the terms and conditions, and in the manner which shall be specified by its by-laws."

These by-laws, we take it, must be reasonable, and if this was a covert attempt to legalize usury, we doubt its success. The courts would be slow to hold that the legislature intended any interference with the usury laws, whatever may have been desired or intended by individuals. A proposition was made in the House, to limit the rates of interest to be imposed at six per cent, but voted down; whether because it was thought superfluous or not, we cannot say.

The seventh section, however, provides, that every borrower from the corporation may have his bond or mortgage or other evidence of indebtedness cancelled when he has repaid an amount equal to the principal sum borrowed, together with the monthly interest thereon, and his fines for defaults. And certainly this monthly interest must be legal interest, and that is six per cent.

The seventh section provides, that every such corporation shall terminate except for the purpose of settling its affairs, whenever all its shares shall have been redeemed by loans and advances thereon, or whenever the funds and property of the corporation shall be sufficient to pay upon the unredeemed shares the value fixed by the by-laws, filed as before provided in the act. Is there no danger from such a sudden suspension of its functions? Suppose the funds and property to-day reach the required amount, must the corporation see to it at its peril that its wheels cease their motion at once? Must it stop its loans, and forbear all acts not necessary for the purpose of settling its affairs, and will acts done after a time when it can be proved that such was the state of its affairs be invalid?

Seven articles of amendment to the Constitution have been adopted, and now await the action of the next legislature and the judgment of the people. The first¹ of

¹ We find that these amendments are not arranged in the laws in the same order in which we have mentioned them here. We are not aware, however, that that is material.

these provides for the election of senators and representatives by districts. The number of senators is not changed. The number of representatives is fixed at three hundred. By the second, a plurality of votes, instead of a majority, which is now required, is sufficient to elect all State officers. The third provides, that the secretary, treasurer, and auditor, now chosen by the legislature, and the attorney-general, now appointed by the executive, shall be chosen by the people. The fourth limits the executive council to to eight members, and gives the choice of these members the people in districts instead of the legislature. The fifth, following the same popular tendency as the third, makes sheriffs, registers of probate, commissioners of insolvency, clerks of courts, and district attorneys elective by the people of the counties and districts. The sixth prohibits any future application of the school fund to the support of sectarian schools. And the seventh fixes the day of the annual election on the Tuesday after the first Monday in November of each year, so as to coincide with the presidential election when that occurs.

We regret to see any even of those officers who only bear the train of justice or touch her ermine, surrendered to the exposure of a popular election. If it is important that those who are to declare the law should be kept from these dangers, is it to be expected that those whose sacred duty it is to record, to preserve, and to execute its mandates, or to invoke its aid in bringing the criminal to justice, are less likely to fall before them.

The attorney-general and the district attorneys have important duties of a judicial character to perform. They have often the power, it is sometimes their duty, to determine a criminal prosecution. Commissioners, sheriffs, and even clerks and registers are officers of justice. They are subject to popular influences, and liable to be misled in the discharge of their duty by the influences to which such a mode of choice exposes them. Perhaps, however, we ought rather to congratulate ourselves that we have escaped the still greater evil of an elective judiciary, or that mongrel system which the people rejected in 1853.

It was a remark of the Cardinal de Retz, already quoted in our pages,¹ that the leading original principle of a gov-

¹ See the article on Hillhouse's Amendments to the Constitution, Vol. xvi. p. 494.

ernment or political system always becomes the cause of its destruction; that its vivifying virtue becomes its fatal vice. Let us be on our guard lest this remark be verified in our own State, by the fatal extension of the elective principle into departments of the government peculiarly exposed to its injurious influences, and but little calculated to profit by its advantages.

There are some things too which the legislature has not done, although we have not time or space to notice at length this portion of their proceedings. They failed to pass any bill modifying the liquor law, in conformity to the late opinion of the Supreme Court. Perhaps, indeed, the friends of that measure may well think it more judicious to postpone further action until reflection and time shall enable them to prepare provisions less likely to prove ineffectual.

A bill to give the alumni of Harvard and Amherst colleges the election of overseers and trustees failed in the senate. Some bills for filling up flats in the harbor of Boston passed away in a quiet slumber on the speaker's table, an extinction which we see no cause to mourn. The act of 1853, giving equitable remedies in suits at law, resisted the efforts of its enemies to suspend or repeal it, and took effect by its terms on the first day of May last.

Resolves were proposed and warmly discussed, which provided for the erection of a monument to Daniel Webster. It is neither our office nor our purpose to enter into this discussion, although we might, indeed, having taken jurisdiction of the subject as part of the proceedings of the legislature, entertain it for other purposes. It was somewhat surprising that the House, if the testimonial proposed was seriously desired by that body, should have yielded to the opposition of a small portion of their number. His friends, indeed would, perhaps, say that they asked his adopted State to commemorate her son for her own sake only, and that no monument was necessary to preserve a name engraved on the Rock of Plymouth, and daily repeated by the obelisk of Charlestown, when touched by the rays of the sun which he invoked to rest upon it. We can imagine one of those who honored the dead, and shared with reverence in the simple funeral honors that were paid to him on the shore of the sea he loved so well,

exclaiming when he heard the aspersions that were cast upon the memory of Webster, —

“ Quis tam crudeles optavit sumere pœnas ?
Cui tantum de te licuit !

Tunc egomet tumulum Rhæteo in litore . . .
Constitui, et magnâ Manes ter voce vocavi.
Nomen et arma locum servant.”

LEADING CRIMINAL CASES.¹

Court of King's Bench, Thursday, February 12, 1761.

REX v. WHEATLEY.²

Crimes — Private Injuries — Distinction between.

It was laid down in our last number, that to constitute a crime, the act done must be an injury to the public ; and under that head we remarked, that “ The most usual injuries to private rights which it has been attempted at times to punish as crimes, are such as arise either from breach of contract, or from fraud, or from trespasses to either real or personal estate ; ” and we considered injuries from breach of contract.

From injuries by breach of contract, we now pass to

(2.) *Injuries by means of fraud.*

Much more uncertainty and confusion exist among the adjudged cases upon the subject of indictable frauds, at common law, than in cases of simple breach of contract. Neither are the decisions entirely harmonious, but from an examination of them all, it may be gathered that by no means was every fraud or cheat indictable at common law. Two things at least were essentially requisite.

1st. The fraud must have been such as tended to injure the public.

2d. It must have been one, against which common prudence could not guard.

The statute of 33 Hen. 8, c. 1, A. D. 1542, made the first inroad upon the common law, by which, the obtaining goods, money, &c., by false “ privy tokens, and counterfeit letters in other men's names,” was made a criminal offence. This statute has sometimes been said to form a part of the common law of this country. 6 Mass. 72 ; 12 Johns. 293 ; 3 Greenl. Ev. § 86. And many cases have discussed what was cheating by false tokens, several of which are subsequently stated in this note.

But this statute, although it modified to some extent the common law, did not render indictable those acts against which common prudence would be a sufficient security. Besides, it was only a partial and limited protection, and many frauds were allowed to go unpunished, because they had not been committed by means of false tokens, technically so called. Farther legislation therefore became necessary, and the Act of 30 Geo. 3, c. 24, s. 1, A. D. 1757, was passed, making it indictable to obtain money, goods, &c., by any *false pretence*. This has been generally re-enacted in

¹ Continued from p. 38.

² Burrow, 1135 ; and 1 Wm. Black. R. 273.

this country, and numerous and delicate questions have arisen upon it, on both sides of the Atlantic, but an examination of them now is foreign to the object of this note.

But to return to the question of frauds indictable at the common law. East says the offence of cheating, at common law, consists in the fraudulent obtaining the property of another by any deceitful and illegal practice or token. (short of felony,) which affects, or may affect the public; such as is public in its nature, and calculated to defraud numbers, to deceive people in general. 2 East, P. C. 817. Hawkins, b. 1, c. 71, s. 1, makes *endeavoring* to defraud another, a crime, but this is clearly incorrect at common law. Numerous early cases illustrate the distinction between a cheat which might be injurious to the public, and such only as affected private rights.

In *Rex v. Bryan*, 2 Stra. 866, A. D. 1730, the defendant came to a mercer, and affirmed that she was servant to the Countess of Pomfret, and was sent by her to fetch some silks for the Queen, endeavoring thereby to defraud the mercer; whereas in fact, she was no servant of the Countess, and was not sent upon the Queen's account. After verdict for the King, it was moved in arrest of judgment by Mr. Fazakerly, that there being no false tokens or any actual fraud committed, there was no offence indictable. Reeve, contra, cited a case from Ventris of an indictment for a conspiracy to charge a man with a bastard child, where there really was no child, so that the party could not suffer. *Sed per curiam*; There the conspiracy was the crime, and an indictment will lie for that, though it be to do a lawful act. This is no more than telling a lie, and no custom being shown to maintain it, the judgment must be arrested.

Other decisions fully sustain the principles here advanced. So, in *Rex v. Pinkney*, A. D. 1733, the defendant was indicted for selling a sack of corn at Rippon market which he falsely affirmed to contain a Winchester bushel, "*ubi revera et in facto plurimum deficiebat, &c.*," and the indictment was quashed upon motion. And in the same case it was said, that if a shopkeeper who deals in cloth pretends to sell ten yards of cloth, but instead of ten yards bought of him, delivers only six, yet the buyer cannot indict him for delivering only six, because he might have measured it, and seen whether it held out as it ought to do or not. *Rex v. Nicholson*, A. D. 1731, before Lord Raymond, is to the same effect. The defendant being indicted for selling six chaldrons of coal, which ought to contain thirty-six bushels each, and delivering six bushels short, Lord Raymond ordered him to be acquitted. Precisely the same decision was made in *Rex v. Dunnage*, 2 Bur. 1130, A. D. 1761. *Rex v. Osborn*, four years afterwards, in the same court, met with the same result. Mr. Justice Ashton thought "that this selling short measure *instead* of full measure, was worthy the attention of the legislature, although it might not be indictable at common law unless charged to be by false measure;" and Wilmot, J., added — "The reason why this is not indictable, is, because it is in every body's power to prevent this sort of imposition, whereas a false measure is a general imposition upon the public, which cannot well be discovered."

Rex v. Combrune, 1 Wils. 301, A. D. 1751, is another of the same class of cases. There the defendant was charged with having delivered to Susan Farmer 274 gallons of strong beer, when he ought to have delivered 268 gallons, as was agreed and paid for. It was moved to quash this indictment, as this was a fraud of a private nature, for which an action upon the case for a deceit was the proper remedy, and here was no charge that the defendant sold by false measure. *Per Curiam* — "This is a mere action of deceit, and the indictment must be quashed."

So, it is not an indictable cheat, to obtain goods, on a promise to send the money for them by the servant who should bring them. *Rex v. Goodhall*, Russ. & Ry. 461, A. D. 1821. So, in *Hartman v. Commonwealth*, 5 Barr, 60, A. D. 1816, it is held that obtaining a false credit otherwise than by false tokens, or the removal and secreting of goods with intent to defraud creditors, are not indictable at common law.

And this was expressly adjudged in *Rex v. Lara*, 6 T. R. 565, A. D. 1796, where the defendant, in payment for goods purchased, fraudulently gave a check on a bank where he knew he had no funds. Lord Kenyon said, "What the defendant did was immoral and highly reprehensible, but as he used no false token to accomplish his deceit, the judgment must be arrested."

The case in 3 Campb. 370, cited in 3 Greenl. Ev. § 84, note 3, as being contra, was decided, under the statute of 30 Geo. 2, against false pretences, and confirms rather than opposes *Rex v. Lara*.

Rex v. Bower, 1 Cowper, 323, A. D. 1775, furnishes another excellent illustration of the principles which the courts have adopted on this subject. There the defendant was found guilty of "knowingly exposing for sale and selling a gold chain, under the sterling alloy, as and for gold of the true standard weight." On motion in arrest of judgment, Lord Mansfield said — "The question is, whether the exposing wrought gold to sale under the standard, is indictable at common law?" "It is clearly an imposition, but I incline to think it is one of those frauds only which a man's own common prudence ought to be sufficient to guard him against, and which therefore] is not indictable, but the party injured is left to his civil remedy."

In *Rex v. Duffield*, Say. 146, A. D. 1754, the defendant was indicted for a cheat in delivering less coal than was purchased, but the indictment was quashed. This was the case referred to in *Rex v. Wheatley*, ante.

So in *Regina v. Jones*, 1 Salk. 379, and 6 Modern, 105, A. D. 1704, the defendant came to A., pretending that he was sent by B., to receive 20l., and he received it, whereas B. did not send him. Being indicted therefor, the indictment was quashed, the court saying, "It is not indictable unless he came with false tokens. We are not to indict one man for making a fool of another. Let him bring his action." S. C. 2 Ld. Raym. 1013.

These principles were sometimes pushed very far, as in *Rex v. Channel*, 2 Stra. 793, A. D. 1727, which was an "indictment against the defendant for that he keeping a common grist-mill and boy employed by W. B. to grind three bushels of wheat, did *vi et armis illicite* take and detain forty-two pounds weight of the wheat. Upon a demurrer, judgment was given for the defendant, there being no actual force laid, and this a matter of a private nature, for which an action would lie."

In close analogy with Channel's case, and apparently somewhat governed by it, it was held in *Rex v. Haynes*, 4 M. & S. 214, A. D. 1815, not indictable for a miller, who received good barley at his mill to grind, to deliver a mixture of oat-meal and barley-meal in return. The meal given in exchange in this case was in fact musty and unwholesome, but as the indictment was insufficient to convict upon that point alone, the judgment was reversed. Lord Ellenborough said — "Also the allegation that the quantity delivered to E. N. was musty and unwholesome, if it had alleged that he delivered it as an article for the food of man, might possibly have sustained the indictment; and as to the other point, that this is not an indictable offence because it respects a matter transacted in the course of trade, and where no tokens were exhibited by which the party acquired any greater degree of credit if the case had been that this miller

was owner of a toll mill, to which the inhabitants of the vicinage were bound to resort in order to get their corn ground, and that the miller's abusing the confidence of this his situation, had made it a color for practicing a fraud, and this might have presented a different aspect; but as it now is, it does seem to be no more than the case of a common tradesman who is guilty of a fraud in a matter of trade or dealing, such as is adverted to in *Rex v. Wheatley*, and the other cases, as not being indictable. These objections, therefore, and one is sufficient, seem to be fatal."

It is to be noted, that in *Rex v. Channel*, the indictment, on its face, was only for unlawfully taking and detaining part of the corn; there was no allegation that the act was done feloniously, and whether the facts proved would have warranted an indictment for larceny or not, the court did not say, as the case came up by demurrer. A similar remark may be made of *Rex v. Haynes*, which was for fraud, not for a felony. The question whether the miller had taken the corn with intent to steal, was not before the court. In this view, the cases are not in necessary conflict with an American case, against a miller, who received barilla to grind, and fraudulently retained part of it, returning a mixture of barilla and plaster of paris, and this was held, not without deliberate consideration, to be larceny at common law. *Commonwealth v. James*, 1 Pinck. 375, A. D. 1823.

So it is immaterial whether the fraud consists in delivering less in quantity than was sold, or in delivering a different article. For in *Rex v. Lewis*, 3 Burr. 1697, decided in 1755, the defendant was indicted for selling as gum senega what was not gum senega, and after a verdict of guilty, judgment was arrested, and Mr. Justice Wilmot pronounced this a very strong case. It is better reported in Sayer, 205. See also *Rex v. Botwright*, Say. 147, A. D. 1754.

So, no indictment will lie for a deceitful representation and warranty of property sold. *Rex v. Pywell*, 1 Stark. 402, A. D. 1816. Nor for twice selling the same property. *Rex v. Codrington*, 1 C. & P. 661, A. D. 1825.

2. The foregoing cases fully settle the difference between private cheats and public frauds. We come now to such cheats as were indictable. Although false tokens were made punishable by statute 33 Hen. VIII., which enlarged the common law in some particulars, yet at common law they were indictable if calculated to affect the public at large, and against which common prudence could not guard. This cheating by false weights and measures, which are known public tokens, was clearly indictable at common law, for these betoken a general design to fraud; they are instruments or tokens purposely calculated for deceit, and by which the public in general may be imposed upon without any imputation of folly or negligence. *Rex v. Burgaine*, 1 Sid. 409. And this rule applies to all cases where any false token is used, as in *Rex v. Edwards*, where cloth was sold with the alneager's seal counterfeited thereon. So, playing with false dice. *Rex v. Maddock*, 2 Rol., Cro. Jac. 497. *Leeser's case*. And pretending to have power to discharge soldiers, and taking money from them for false discharges. *Serlested's case*, Latch, 202. Another class of cases indictable at common law, are cheats which affect the public justice, such as doing judicial acts without authority in the name of the author.

In addition to these, there are instances to be found in the books, of cheats in their nature private, which have yet been held indictable at common law; but upon examination they will appear to be founded either in conspiracy, forgery, or as involving considerations of public justice, public trade, or public policy. The whole subject is carefully examined in 2 East, P. C. 816, title Cheats.

In America, the same general principles in regard to what constitutes an indictable fraud at common law, were recognised in *Comm'th v. Warren*, 6 Mass. 72, A. D. 1809. There one Warren was indicted for contriving and intending to deceive, cheat, and defraud one Adams, by falsely pretending and affirming to him that his name was Waterman, that he lived in Salem, and there kept a grocery store; and that he wished to purchase goods on credit, giving his own note as security therefor; and B. confiding in such false pretences and affirmations, sold him the goods, and took his note, which he subscribed with the name of Waterman. This was held no crime, and Parsons, C. J., said, in closing his opinion—"We see here no conspiracy, for the defendant was alone in the fraud, and no false tokens to induce a credit; and as for false weights and measures, there is no pretence. We cannot therefore consider the facts stated in the indictment, (however injurious they were to Adams,) as constituting a public indictable offence." *The State v. Justice*, 2 Dev. 199, A. D. 1829, is to the same effect. So it was held no crime, but only a private wrong, for the grantee of a deed lodged with a third person as an escrow, fraudulently to obtain possession of the deed from such depository. *Comm'th v. Hearsey*, 1 Mass. 137, A. D. 1804.

And in another American State, a similar decision was made. There A. having a judgment against B., the latter said he would settle it by paying money in part, and giving his note for the residue; on which A. drew a receipt in full discharge of the judgment, and B. obtained the receipt without paying the money or giving the note; upon which he was indicted for having obtained the receipt "falsely, fraudulently and deceitfully, and under false colors, acts and pretexts," &c. It was held there was no common law offence, no cheating by any false token, and nothing but a false assertion, which common prudence would have guarded against, and therefore that no indictment would lie. *People v. Babcock*, 7 Johns. 201, A. D. 1810. Seven years afterwards, the same subject was before the same court in *The People v. Miller*, 14 Johns. 371, A. D. 1817, where the defendant obtained possession of a promissory note by pretending that he wished to look at it, and then carried it away, and refused to deliver it to the owner, it was held that this was merely a private fraud, and not punishable criminally, and *The People v. Babcock* was cited with approbation.

So in *State v. Wilson*, 2 Rep. Const. Ct. 139, A. D. 1818, it was held not an indictable cheat to sell a girl as a slave who was known to be free, and the principle of the English decisions was approved.

Neither is it an indictable cheat to put a large stone in one roll of butter, with intent to defraud the buyer. *Weierbach v. Tirone*, 2 W. & S. 408, A. D. 1841, which was an action of slander for charging the plaintiff with cheating. Gibson, C. J., said—"With what then was the plaintiff charged? Not with cheating in a course of public dealing, but with an attempt to cheat in a private transaction, against which common care and prudence were sufficient to guard, because the fraud attempted was alleged in fact to have been unsuccessful; it was discovered before the transaction was concluded; and the buyer paid for no more than he got. As the plaintiff therefore could not have been prosecuted for a cheat had the charge been true, the words are not actionable."

The subject of cheating by false tokens, at common law, has also been under consideration in this country, and the principles of the early English decisions adopted. This point was discussed in *The State v. Stroll*, 1 Rich. 244, A. D. 1845. The defendants there offered in payment for goods a bank bill which they knew to be worthless. The majority of the court held a false bank bill to be a *public token*, and cheating by it an

offence at common law. O'Neal, J., was of the contrary opinion, apparently thinking there was nothing to distinguish this case from *The State v. Middleton*, Dud. 275, before the same court, where the instrument offered was the promissory note of an individual, which was not considered a public token, and therefore not indictable. But the case is in analogy with *Lewis v. The Commonwealth*, 2 S. & R. 551, A. D. 1816, which was an indictment at common law for passing a counterfeit bank note. Tilghman, C. J., said — "It is a principle of the common law, that offences falling under the head of the *crimen falsi*, such as forgery and cheating, may be punished by the pillory. It is not every cheat indeed which may be so punished. One may cheat another by barely telling a lie to deceive him in the quality of goods sold. Such description would not be subject to an indictment. But a cheat which affects the public, is indictable. The offence charged in this indictment must affect the public. Bank notes, though not strictly money, are its representatives, and circulate generally in the place of the lawful money of the country. . . . I see no reason to doubt that at common law this offence was subject to an infamous punishment."

Commonwealth v. Speer, 2 Virginia Cases, 65, A. D. 1817, is to the same effect; and *The Commonwealth v. Searle*, 2 Bian, 332, A. D. 1810, goes still further.

But the promissory notes of individuals, unless made to resemble bank notes, are not public tokens, and passing them as good when known to be worthless, is not an indictable cheat at common law. *State v. Patillo*, 4 Hawks, 348, A. D. 1826.

The doctrine of public tokens was also involved in the early case of *Respublica v. Powell*, 1 Dall. 47, A. D. 1780. The defendant, a baker employed by the army of the United States, was indicted at common law for a cheat in baking 219 barrels of bread and marking them as weighing eighty-eight pounds each, whereas they weighed only sixty-eight pounds. For the defendant it was contended that false tokens were indictable only by the stat. 33 Hen. 8, c. 1, which it was claimed had no operation in Pennsylvania. The attorney-general insisted that the defendant's offence was a public trust. The court said this was clearly an injury to the public, and the fraud the more easily to be perpetrated since it was the custom to take the barrels of bread at the marked weight, without weighing them again. The public, indeed, could not by common prudence prevent the fraud, as the defendant himself was the officer of the public, *pro hac vice*. They were therefore of an opinion that the offence was indictable.

So far, the decisions on both sides of the Atlantic are apparently harmonious, but one American case seems to us in conflict with the English decisions, and with correct principle. We refer to *The State v. McLeran*, 1 Aik. 311, A. D. 1826. The defendant was indicted under the statute of Vermont for forgery. The specific fact set out was, that there having been an indorsement of part payment on the back of a promissory note payable to the defendant, the defendant, "with force and arms, wittingly, falsely, and deceitfully separated said indorsement from the note, with intent to deceive and defraud the maker." To this the defendant demurred. The court held the facts alleged did not amount to forgery under a statute of that State, but were nevertheless "as great a crime against public justice and the public peace, as were those forgeries which did come within the statute. It is as great a crime, said they, *in foro conscientie*. It is an act *malum in se*. It is a crime at common law." Notwithstanding the respect to which the decisions of this court are generally entitled, the case above cited seems unsupportable, for two reasons, —

1st. The act, if successful, would have affected only private rights, and inflicted only a private injury.

2d. No person was in fact defrauded or injured by the act. The indictment did not allege that the maker was obliged to pay, or ever did pay, the whole amount of the note, or that any person took the note believing the whole sum named on its face to be justly due. In neither light, therefore, can we see that any offence cognizable at the common law was in fact committed.

The same error seems to have been made by the learned judge who pronounced the judgment in *Hill v. The State*, 1 Yerg. 76, A. D. 1824, where it was held no forgery for a creditor to induce his debtor by false representations and false reading to sign a note for more than was due, but the *dictum* was that this amounted to an indictable cheat.

The case of *State v. McLeran*, *supra*, seems to us also in conflict with the case of *Wright v. The People*, 1 Bree. 66, A. D. 1825, where it was held not an indictable fraud to separate the condition from the penalty of a bond. A very clear opinion is given by Mr. Justice Smith, who said — "In the present case it is a mere private injury, the public could in no way be affected by the act; nor is it a case of false tokens which is necessary to be shown, in a fraud on a private individual;" the act of separating the condition, he said, could not be considered as one which common prudence could not have guarded against.

(3.) *Injuries by torts.*

It is equally clear, that an injury to private property by a tortious act, is no more a crime at common law, than a breach of simple contract. Neither does the fact that such tortious act was wilfully done, or *vi et armis*, materially affect the case.

Thus in *Rex v. Atkins*, 3 Bur. 1706, A. D. 1765, the defendant was indicted for forcibly pulling off the thatch from a man's dwelling-house while he was in the peaceable possession of the same. But the indictment was quashed by Ld. Mansfield and Mr. Justice Ashton, as being only a civil injury. *Rex v. Gillet*, 3 Bur. 1707, is to the same effect.

So any trespass to real estate, not amounting to *forcible entry*, technically so called, is not indictable. *Rex v. Bake*, 3 Bur. 1731, A. D. 1765; *Rex v. Storr*, 3 Bur. 1698, A. D. 1765. The last was "for unlawfully entering the yard of a Mr. Sweet, digging up the ground, and erecting a shed, and unlawfully, and with force of arms putting out and expelling the said Sweet from the same, and keeping him from the same." The question whether this was a crime, or only a civil injury, was carefully considered, and the indictment was unanimously quashed, as averring no offence known to the law. The mode of disposing of the indictment is strong proof of the clear opinion of Lord Mansfield and his associates on this subject, as indictments were not quashed on mere motion, unless the case was considered too clear to allow it to proceed further. We are aware that in Missouri, a different doctrine has been acted upon, and it was there considered a crime at common law to unlawfully throw down the roof and chimney of a dwelling-house, with force and arms, in the peaceable possession of the owner. But the question does not seem to have received much consideration, and is in conflict with *Rex v. Atkins*, *supra*.

Neither will an indictment lie for enticing an apprentice to absent himself from his master, because it doth not affect the public. *Regina v. Daniel*, 3 Salk. 191, A. D. 1704. Nor for slanderous words spoken. *Regina v. Langley*, 3 Salk. 190, A. D. 1704; *Rex v. Penny*, 1 Ld. Raym. 153, A. D. 1696.

So, in 1690, Elizabeth Stonehouse was indicted for falsely and ma-

liciously accusing Henry Bradshaw of felony and of robbing her, intending thereby to deprive him of several sums of money; but this was held to be no public wrong, and the party having his remedy by action on the case, the indictment was adjudged ill. *Rex v. Stonehouse*, 3 Salk. 188.

Trespasses to personal chattels fall under the same rule. Thus in *The State v. Farnsworth*, 10 Yerg. 261, A. D. 1837, the indictment charged that the defendant "with force and arms, one mare, the property of A., did unlawfully and forcibly take from and out of the possession of the said A." This was held no crime, but only a civil injury. And this was but the repetition of an old case in 1780, before Perryn, B., at the Salisbury Assizes, where an indictment averred that the defendant, with force and arms, unlawfully, forcibly and injuriously, seized, took and carried away, of and from J. S., and against his will, a paper writing purporting to be a warrant to apprehend the defendant for forgery; and after a conviction a motion was made in arrest of judgment, on the ground that the charge did not amount to an indictable offence. Perryn, B., took time to consider to the subsequent assizes, and had the case argued before him, and then held the objection valid, as the indictment charged nothing but a mere private trespass, and neither the king nor the public appeared to have any interest therein. 1 Russ. on Crimes, 53.

Neither is it a crime forcibly to take from an officer goods which have been seized by him on execution, there being no assault upon him, for this is only a private injury, and the officer may have his action for it. *State v. Sotherlen*, Harp. 414, A. D. 1824.

Thus far there is no difficulty, and not much conflict of authority. But when the personal property of another has been destroyed wantonly, maliciously, and under such circumstances as indicate a revengeful spirit and a general malicious disposition, there is much discrepancy among the adjudged cases whether this is, or is not, an offence at common law. One of the strongest cases to be found in the affirmative of this question, is that of *The People v. Smith*, 5 Cow. 258, where the defendant was indicted for "maliciously, wickedly and wilfully killing a cow," the property of another. Upon the point whether this was an indictable offence at common law, Woodworth, J., observed — "There is no precise line, by which indictments for malicious mischief are separated from actions of trespass. Blackstone, in the 4th volume of his Commentaries, speaks of the former as done, not *animo furandi*, or with an intent of gaining by another's loss; but either out of a spirit of wanton cruelty, or black and diabolical revenge. It cannot be expected, that the mere liability to damages, will operate on a mind so depraved. The injury may be committed when none but the person injured is a witness. The perpetrator may be insolvent; and thus gratify his malice with impunity, if there is no redress otherwise than by civil action. This would be contrary to the policy of every well regulated government; which is to protect the citizen in his right, by restraining and punishing the wrong doer. The offence is distinguishable from an ordinary trespass, in this — that it is not only a violation of private right, without color or pretence, but without the hope or expectation of gain. Such an act discovers a degree of moral turpitude dangerous to society; and, for their security, ought to be punished criminally. It is an evil example of the most pernicious tendency, inasmuch as the act is an outrage upon the principles and feelings of humanity. The direct tendency is a breach of the peace. What more likely to produce it, than wantonly killing, out of mere malice, a useful domestic animal?"

"Acts injurious to private persons, which tend to excite violent resentment, and thus produce a disturbance of the peace, have always been held

indictable. Thus sending a challenge to fight a duel, or publishing a libel, are indictable offences.

"It appears to me, that the offence stated in this indictment is a proper subject of criminal prosecution. It was so held in *Respublica v. Teischer*, 1 Dall. 353, a case precisely like the present. M'Kean, Ch. J., observed that the poisoning of chickens, cheating with false dice, fraudulently tearing a promissory note, and many other offences of a similar description, had been indicted in Pennsylvania. This case is approved in *The Commonwealth v. Taylor*, 5 Binn. 277. In *Commonwealth v. Leach*, 1 Mass. 59, the defendants were indicted for poisoning a cow. The only question raised was, whether the sessions had jurisdiction. There was not even a suggestion, by the court or counsel, that the offence was not indictable.

"I entertain no doubt, that the conviction in this case was warranted by the principles of the common law; and judgment should be given against the defendant."

The principles here laid down were entirely adhered to by the same court in *Loomis v. Edgerton*, 19 Wend. 419, A. D. 1838. That was an action of trespass against an officer for arresting the plaintiff upon a complaint and warrant charging him with having "with force and arms, &c., wilfully, wickedly, maliciously, and in a secret manner, seized and broken in pieces, a cutter," &c. It was claimed by the plaintiff, that the act charged was not a criminal offence, but the court held the contrary, and Cowen, J., said — "The principle of the case of *The People v. Smith*, 5 Cow. 258, and of the cases there cited, is in point, that malicious mischief done to any kind of property is a misdemeanor. The general principle is there laid down, and exemplified by various cases, and must be maintained." And finally — "We are clear that the warrant in the case at bar ruled a criminal offence."

The same view had been taken much earlier in Pennsylvania, in the case of *Respublica v. Teischer*, 1 Dall. 355, A. D. 1788, where the indictment was for maliciously, wilfully and wickedly killing a horse. Ch. J. McKean said — "It is true, that on the examination of the cases we have not found the line accurately drawn, but it seems to be agreed that, whatever amounts to a public wrong, may be the subject of an indictment." He instances offences held indictable, and remarks, "Unless indeed an indictment would lie, there are some very heinous offences which might be perpetrated with absolute impunity, since the rules of evidence in a civil suit exclude the testimony of the party injured, though the nature of the transaction generally makes it impossible to produce any other proof." And the indictment was held to lie in the case before him. And this was followed in the same court by *Commonwealth v. Eckert*, 2 Browne, 249, A. D. 1812, for maliciously destroying a tree standing on public ground in a village.

An early case in Massachusetts, also seems to sanction the same doctrine, and a prisoner was there convicted at common law of maliciously poisoning a neighbor's cow. *Commonwealth v. Leach*, 1 Mass. 59. The point whether this act was indictable at common law, does not appear to have been directly raised, but the only question before the court was whether the Court of Sessions had jurisdiction of this offence. However, the case has been often cited since by the same court, and without expressed disapprobation. And as a subsequent statute has made the act criminal in that State, that court may never be called upon to decide directly whether such an act was or was not indictable at common law. In other States, however, *Commonwealth v. Leach* has certainly been relied upon as deciding that malicious destruction of domestic animals was a

misdeemeanor at common law, and it has probably had its full share in establishing that doctrine in many States.

These cases were subsequently approved, and their principles adopted in *Commonwealth v. Taylor*, 5 Binn. 277, A. D. 1812. There the indictment charged that the defendant "Unlawfully, secretly and maliciously, with force and arms, broke and entered at night the dwelling-house of B., with intent to disturb the peace of the Commonwealth, and after entering the house, unlawfully, wilfully and turbulently, made a great noise, in disturbance of the peace of the Commonwealth, and did greatly misbehave within said dwelling-house, and did greatly frighten and alarm the wife of the said B., whereby she miscarried," &c. This was held not to amount to a forcible entry at common law, and therefore not indictable as such; but the court considered it a misdemeanor at common law. Similar views to those upon which this decision is founded, seem to underlie the decision in *Commonwealth v. Wing*, 9 Pick. 1, A. D. 1829, where it was held that if one discharges a gun at wild fowl with knowledge and warning that the report will affect injuriously the health of a sick person in the neighborhood, and such effect is produced by the discharge, he is guilty of an indictable offence, and Parker, C. J., said — "If the indictment were for a nuisance, the authorities cited by the defendant's counsel would clearly show, that it could not be sustained; for the most that could be made of it would be a private nuisance, for which an action on the case only would lie. But we think the offence described is a misdemeanor, and not a nuisance. It was a wanton act of mischief, necessarily injurious to the person aggrieved, after full notice of the consequences, and a request to desist. The jury have found that the act was maliciously done.

"In the case of *Cole v. Fisher*, 11 Mass. 137, Chief Justice Sewall, in delivering the opinion of the Court, speaking of the discharging of guns unnecessarily, says, if it is a matter of idle sport and negligence, and still more when the act is accompanied with purposes of wanton or deliberate mischief, the guilty party is liable, not only in a civil action, but as an offender against the public peace and security, is liable to be indicted, &c.

"Now the facts proved in the case, namely, the defendant's previous knowledge that the woman was so affected by the report of a gun, as to be thrown into fits, the knowledge he had that she was within hearing, the earnest request made to him not to discharge his gun, show such a disregard to the safety, and even the life of the afflicted party, as makes the firing a wanton and deliberate act of mischief."

So in *The State v. Batchelder*, 5 N. H. 549, A. D. 1832, it was judged an indictable offence at common law to break with clubs the window of a dwelling-house in the night, and thus disturb the peace and quiet of a family therein. But this seems to have proceeded principally upon the ground that the acts charged amounted to a breach of the public peace, and not merely a trespass upon private property — or as a species of forcible entry into a dwelling-house, which all agree is indictable at common law. *Harding's case*, 1 Greenl. 22, A. D. 1820; *Rex v. Bathurst*, Say. 225, A. D. 1755; *Rex v. Wilson*, 8 T. R. 357, A. D. 1799.

The doctrine of *The People v. Smith*, and *Respublica v. Teischer*, ante, was once recognised in the State of Vermont. *The State v. Briggs*, 1 Aik. 226, A. D. 1826. In this case it was held, that if one confine colts, and from motives of wicked and malicious mischief fix a sharp instrument at the place of their escape, and then, with intent to wound, maim and destroy them, do force them over such instrument, whereby they are wounded, he is guilty of a misdemeanor at common law, and may be indicted therefor, and Hutchinson, J., said — "It is urged on the part of

the respondents, that no such indictments are to be found in England; also that the statutes in England would probably not have been enacted if the act were an offence at common law; while the attorney for the State contends that these ancient statutes, acquiesced in, have the effect of and even become common law. We cannot treat those statutes as common law, nor as in force here. Nor does the existence of these statutes prove that the acts to which they annex penalties were not offences at common law. Their penalties are so severe, that their existence rather proves that the punishments of the common law were too mild to prevent the commitment of these offences, or at least that they were so considered. And these statutes are so ancient, that it is not strange that the reports contain no prosecutions at common law for the like offences; for after the statutes existed, they would be apt to indict under the statutes." But this case is entirely inconsistent with the subsequent case of *The State v. Wheeler*, *post*, in the same court.

In Tennessee, also, at an early day, it was held an offence at common law to wilfully and maliciously stab a horse. *The State v. Council*, 1 Overt. 305, A. D. 1808. But this principle does not seem to have been adhered to afterwards. See *Shed v. The State*, *post*.

The Supreme Court of North Carolina also adopted the same doctrine, and decided that "unlawfully, wickedly, maliciously and mischievously burning a hundred barrels of tar," the property of another, was an offence at common law. *The State v. Simpson*, 2 Hawks, 460, A. D. 1823. It is somewhat remarkable, that the attention of the learned judge who delivered the opinion was not attracted by the language of Blackstone, quoted by him, 4 Bl. Comm. 243, that this was only a trespass at common law.

The case was however followed and approved in *The State v. Scott*, 2 Dev. & Bat. 35, A. D. 1836, which was for maliciously killing a steer. Two years afterwards, the same question was again before the same court, when they seem to have doubted of the propriety of their former decisions, but deemed it too late to adopt a different doctrine. *The State v. Robinson*, 3 Dev. & Bat. 130, A. D. 1838, — which was for maliciously breaking a wagon. The court below told the jury that although the injury was done from mere sport and wantonness, the defendant was guilty, although he had no malice against the owner. This was clearly wrong, and was severed on appeal, the court holding "that malicious mischief, to be indictable, consists in the wilful destruction of some article of personal property, from actual ill will or resentment towards its owner or possessor."

And this principle as to the necessity of actual malice, has been frequently laid down in those States where malicious mischief is made punishable by statute. *Rex v. Pearce*, 1 Leach, 594, A. D. 1789; *State v. Pierce*, 7 Ala. 728, A. D. 1845; *Commonwealth v. Walden*, 3 Cush. 558, A. D. 1849.

But the general doctrine of malicious mischief as first laid down in the courts of North Carolina, is apparently still adhered to, and may be considered the settled law of that State. *The State v. Helmes*, 5 Ired. 364, A. D. 1845. Confining it, however, strictly to personal property. *The State v. Jackson*, 12 Ired. 329, A. D. 1851, a case of malicious destruction of two ploughs, where, however, judgment was arrested because the act was charged as having been done "feloniously, wilfully and maliciously," but not mischievously, or with malice against the owner. *The State v. Latham*, 13 Ired. 33, A. D. 1851, for maliciously killing a dog, where it was held, in conformity with the English decisions under the Black Act, that the killing must have been from malice to the owner, and not from passion against the animal.

We cannot but think that some of these cases have lost sight of the true distinction between crimes and private trespasses, and in their abhorrence of the wanton cruelty and wicked disposition exhibited by the defendants in the several cases, have forgotten that after all there was no more injury to the public in destroying private property wantonly and maliciously, than in any other manner, and they seem rather to declare what the law should be, than what it then was. It is clear that the various acts now punished as malicious mischief, such as destroying trees, killing domestic animals, &c., were not indictable in England until made so by statute. For we have in *Ranger's case*, 2 East, P. C. 1074, A. D. 1798, an indictment at common law, which charged "that the prisoner, with force and arms, &c. &c., one black gelding, of the value of 30*l.*, of the goods and chattels of Wm. Collyer, then and there being, then and there unlawfully did maim, to the great damage of Collyer, and against the peace. But upon reference to the judges after conviction, they all held that the indictment contained no indictable offence, for if the case were not within the Black Act, the fact itself was only a trespass, for that the words *vi et armis* did not imply force sufficient to support an indictment."

So in *Regina v. Wallace*, 1 Craw. & Dix, C. C. 403, A. D. 1840, it was held that maiming cattle was not a misdemeanor at common law, but only a trespass to property. And in Maine, it has been considered no offence at common law to maliciously cut and girdle another's fruit trees. *Brown's case*, 3 Greenl. 177, A. D. 1824.

From Blackstone, also, it appears that such acts were not crimes at common law. "Malicious mischief, or damage," he says, "is the next species of injury to private property which the law considers as a public crime. This is such as is done, not *animo furandi*, or with intent of gaining by another's loss; which is some, though a weak excuse; but either out of a spirit of wanton cruelty or black and diabolical revenge. In which it bears a near relation to the crime of arson; for as that effects the habitation, so this does the other, property of individuals. And therefore any damage arising from the mischievous disposition, though only a trespass at common law, is now by a multitude of statutes, made penal in the highest degree." 4 Bl. Comm. 243. Here we have the direct testimony of this learned commentator in accordance with the principle we have before laid down, and in conflict with many early decisions in his country.

Russell on Crimes, Vol. 2, p. 544, says, that "Injuries of this kind were made punishable by different statutes passed from time to time, as they appeared to be required for the protection of the community."

In Christian's edition of Blackstone, Vol. 4, p. 5, note 7, the Editor says, "To destroy another's property wilfully, without making him compensation, is a worse crime in reason, than theft; because the individual deprived of his property suffers precisely the same injury, and the public loses the benefit of that property which contributes to the support of no one; and he who does the injury has not the temptation of him who steals to supply his wants. In those actions which are only civil injuries, and to which no legal punishment is annexed, the law has supposed that retribution will be sufficient to deter the commission of them. But the wilful and malicious destruction of another's property by fire is in many cases punished with death; so also is the malicious killing and maiming of another's cattle; yet these detestable and diabolical acts, were not crimes by the common law of England. Experience discovered the necessity of rendering them subject to public and severe punishment."

The absence of any reported cases of indictments for malicious trespass in the English books anterior to the passage of the several statutes here-

after referred to, and the great frequency of them soon afterwards, are both pregnant facts, furnishing some evidence that at common law such acts were not indictable, for we can hardly believe that mankind were so much more depraved in the latter than in the former period, or that the rights of property were more clearly understood, or more conscientiously respected in the fifteenth and sixteenth, than in the seventeenth and eighteenth centuries.

In 1 Hale's Pleas of the Crown also, p. 561, it is laid down that " Burning of a frame of a house (not a dwelling) or of a stack of corn was no felony by the common law."

From the fact, too, that the older writers on criminal law say nothing of such an offence as malicious mischief, it might be inferred that anterior to the statutes it was unknown, and was not a fact of the ancient common law of England.

The first English statute on the subject was not passed until the 22 Hen. VIII. (1531), and was confined to the powdike in the fens of Norfolk and Ely. The next act forbid the malicious burning of any barn or stack of corn, or grain, and was not enacted until 43 Eliz. c. 13, A. D. 1661. And it was not a crime in England to maliciously kill any cattle until the 22 and 23 Car. II. c. 7, A. D. 1670. And by the same act, maiming such animals was only a trespass punishable with treble damages. The famous Black Act, which forbid so many kinds of malicious mischief, and which is the probable foundation of most of the American statutes on the same subject, was never on the statute book until the 9 Geo. I. c. 22, A. D. 1723. It can hardly be claimed therefore with truth, that these statutes comprised any part of the common law at the time our ancestors came here, and were brought with them as such; and in one American State, it has been formally adjudged that the Black Act composed no part of the law of this country, and an indictment founded upon it was quashed. *State v. Campbell*, Charlton T. U. P., 166, A. D. 1808. And in another State it has been held that the malicious burning of standing corn, which in England is made punishable by 7 and 8 Geo. IV. c. 30, is not in this country a crime. *State v. Holmes*, 5 Ired. 364.

It would seem therefore that all our decisions on this subject, (in States where no statutes exist,) should conform to the English law anterior to the statutes above cited, and in many States we find this to be the case.

Thus in Vermont, notwithstanding the case of *State v. Briggs*, *supra*, and in direct conflict with *The People v. Smith*, 5 Cow., we find it held in *The State v. Wheeler*, 3 Verm. 344, that an indictment cannot be sustained for " feloniously, maliciously, mischievously, and wickedly " killing another's beast. That case was fully argued, and Prentiss, C. J. (now judge of the U. S. Court for that district) said — " It seems, however, to be clear that, though every trespass which is a disturbance of the peace is indictable, a mere trespass which is the subject of a civil action cannot be converted into an indictable offence." " The epithets wilfully, maliciously, &c., contained in the information, are words of mere form which may be applied to every trespass or injury to private property, and neither they nor the special statement of the manner in which the act was done, showing actual force, can have the effect to make the suit a public offence."

This case was cited and approved in *Illies v. Knight*, 3 Texas, 316, A. D. 1848.

Shell v. The State, 6 Humph. 283, A. D. 1845, is to the same effect, for maliciously destroying saddle-bags, and seems tacitly to have overruled the earlier case of *The State v. Council*, 1 Overt. 305, *ante*. And in *Taylor v. The State*, 6 Humph. 285, it would appear that all the prosecutions for malicious injuries are founded upon the statutes of that State.

So it has been held in New Jersey, following the English cases before cited, that it was not an indictable offence, to "wilfully, maliciously, and unlawfully" take up and remove a corner-stone in the boundary line between the defendant and his neighbor, with intent to injure and endamage the latter *State v. Burroughs*, 2 Halst. 426, A. D. 1802; *Comm'th v. Powell*, 8 Leigh, 719, A. D. 1837. Nor to "frequent a neighbor's house, and grossly abuse his family, making their lives extremely uncomfortable." *Comm'th v. Edwards*, 1 Ashm. 46. And in *The State v. Smith*, 1 Cheves, 157, A. D. 1840, it was held in South Carolina, not indictable to shave and crop the hair from the tail of a mare in the owner's stable. The Court said, "It can be regarded only as a malicious trespass."

It was not intended in this note to discuss the general subject of crimes and misdemeanors, but to allude to such only as bordered closely on the line of demarcation which separates mere private injuries from those of a public and general nature. And with the exception of the discrepancy among the authorities on the subject of malicious injuries, the adjudged cases may easily be reconciled, and the general principles are now clearly defined, well understood, and, in most cases, correctly applied.

E. H. B.

Recent American Decisions.

District Court of the United States for the Northern District of New York.

IN ADMIRALTY.

**THE STEAMBOAT HENDRIK HUDSON, HER TACKLE, APPAREL AND
FURNITURE, AND ANSEL R. COBB AND NELSON WILLARD,
CLAIMANTS.**

By the custom existing at the ports of the great northern and northwestern Lakes, the master of a steamboat or vessel, employed as a general ship, has, by virtue of his office of master, full authority, upon the receipt of merchandise and other property on board his vessel subject to a lien for prior freight and charges of carriers and warehousemen for previous transportation, storage, &c. of such merchandise and property whilst on its way to its ultimate destination, to contract, in and by his bill of lading, to receive and transport such merchandise and property, to its port of destination; to receive such prior freight and charges on the delivery of such merchandise and property; and to bring back and pay over to such shipper, on the return of his vessel, the moneys received for such prior charges; if such is the ordinary course of the usual employment of such steamboat or vessel.

The evidence produced in this case fully established the existence of a custom for the masters of steamboats and vessels to make such a contract; and that such custom had been generally known, for fifteen years or more, by shippers and forwarders, and by the masters and owners of vessels engaged in the business of such lakes. It was therefore held

that such a contract, made by the master, in this case, bound his vessel, and owners, to its performance.

Such a custom is reasonable and lawful ; and such a contract, when authorized by a well-known, long established and universal custom, and made by the master in the course of the usual employment of his ship, is binding, not only against himself and his owners *in personam*, but also against his vessel *in rem* ; and not only against the interests of the general owners in the vessel, but also against the interests of other parties having common law liens ; or having maritime liens, which from their nature and character, or the time of their creation, can be affected by the lien of the shipper, to whom the ship, *in specie*, is bound by such contract.

It seems such a contract, when made by the master, by virtue of a special and extraordinary authority from the ship owner, and without any known or general custom to authorize it, would not confer a lien on the ship binding upon mortgagees or others having liens : and that a lien, binding on mortgagees, &c., can only exist when the custom is such that the authority of the master to make the contract results from, and is conferred by, his mere appointment as master of the ship, without the delegation of other authority, than such appointment, *per se*, confers.

The ship, *in specie*, is, by the general maritime law, bound to the performance of all contracts made by the master in the usual course of the employment of the vessel, and the contract made by the master in this case being authorized by the custom, bound the ship to its performance ; and the shipper had a maritime lien upon the ship, for his security, which lien can be made available by a proceeding *in rem* in the admiralty.

Such an admiralty lien, (like all other maritime liens,) is a *privileged hypothecation*, and takes preference of all liens and debts not privileged ; and it is entitled to its proper place, in regard to its preferences and priority, amongst other privileged debts secured by a marine hypothecation of the same vessel.

An ordinary common law chattel mortgage upon a ship or vessel, though given for the purchase-money, and filed and recorded, as required by the law of the State to which the vessel belongs, and the law of the United States, prior to the making of such a contract as was made in the present case, does not entitle the mortgagee to claim the surplus of the proceeds of a ship sold under the process and decree of a court of admiralty, in preference to the privileged creditor who has a maritime lien under a bill of lading containing such a contract for the receipt, return and payment of the prior charges on merchandise and property laden on board a general ship, under such a custom as was proved in this case.

STATEMENT OF FACTS.

THE steamboat Hendrik Hudson, her tackle, apparel and furniture, were libelled by the Michigan Southern Railroad Company, for the recovery of the amount due them for certain charges of transportation, which were a lien upon sundry different packages, parcels, articles of merchandise, and other property, which the libellants, in the ordinary course of their business, had received and transported upon their railroad while such merchandise and property were on their way to their ultimate destination ;

and which merchandise and property the railroad company had delivered, subject to the lien thereon for such charges, on board the Hendrik Hudson, in the month of November, 1852, for further transportation to, or towards, the point of final destination.

At the several times of the delivery of the merchandise and property referred to on board the Hudson, the master executed and delivered to the railroad company, as the shippers of such merchandise and property, the usual bills of lading therefor. The captions of all these bills of lading were in the following form : —

“Shipped, in good order and condition, by The Michigan Southern Railroad Company, on board steamer Hendrik Hudson, whereof Goldsmith is master, the following property, as here marked and described, to be delivered in like good order and condition, (dangers of navigation excepted,) as addressed on the margin, or to his or their assigns or consignees, only upon the payment of the freight, transportation and charges as noted below, which said carriers undertake to collect, return and pay.”

Following these captions, there was contained in each bill of lading the usual statement of the property laden on board the steamer, with the marks thereon, and the names of the owners or consignees, and also a statement of the prior charges to which the shippers were entitled, as well as the rate or amount of the steamer's freight ; and at the end of each bill of lading, were the letters “C. C.,” or the words “Capt. Collect,” or “Capt. Collect, and pay J. H. Raynor ;” thereby indicating that the master of the Hudson was authorized to collect such prior charges, and to whom they were to be paid, at the port of destination, in the cases where they were not to be returned to the shippers.

It was satisfactorily proved by the concurring testimony of persons who had been engaged in business upon the lakes, as forwarders, shippers and vessel-owners, from nine to twenty-seven years, that the letters “C. C.,” or the words “Capt. Collect,” in such a bill of lading, by the known and universal custom and usage of the lakes, were understood to mean that the ship-master who executed such a bill of lading was to collect the prior freight and charges mentioned in the bill, (and which follow the property,) and return and pay over the amount of such prior freight and charges to the shippers ; and that by such usage and cus-

tom it was the master's duty to do so; that sometimes directions were given in such bills of lading for the captain to collect the prior freight and charges, and pay them over to some agent at the port of destination, in which case a direction, similar to that in some of the bills of lading in this case directing payment to be made to J. H. Raynor, was given; and that in such cases it was the duty of the master, by the universal custom of the lakes, to collect such prior freight and charges, and pay them over as directed; that shippers sometimes received from the master of a vessel the amount of these prior charges at the time of the shipment of the property on which they were a lien, and then collected them at the port of delivery; but that this advance of the prior charges was not often required; and that property was generally shipped under a bill of lading, like those shown in this case, with the understanding and agreement that the prior freight and charges were to be received by the master of the vessel on the delivery of his freight, and paid over to the shipper's agent, or returned and paid over to the shippers themselves on the return of the vessel, according to the direction and agreement of the bill of lading.

It is deemed unnecessary to state in detail the testimony in reference to the custom of the lakes. It is sufficient to state, that it was such as to leave no doubt that the master of the Hudson, at the time of the receipt of the merchandise and property described in the bills of lading under which the libellants claim, contracted, according to the custom and usage of the lake ports, to collect, on the delivery of such merchandise and property, the prior freight and charges mentioned in the bills of lading, and to pay over to the shippers or their agents the amounts received therefor; and that such testimony satisfactorily established the fact, that in consequence of a long-established custom and usage prevailing upon the lakes and their connecting waters, and at the ports thereon, forwarders, shippers, and masters and owners of steamboats and sailing vessels, well understood that the master was fully authorized, under and by virtue of his simple appointment as master, to make such contracts.

It was also shown that the Hudson, during the season of 1852, was employed as a general ship, making frequent trips along the southerly shore of Lake Erie; and it was admitted that the goods mentioned in the bills of lading as

shipped by the libellants, had been delivered by the master of the Hudson, and the prior freight and charges thereon received by the clerk of the steamer, and that no part thereof had been paid over, though the vessel had returned to the place of shipment after such delivery, and some time before this suit was commenced.

The amount of the libellant's claim was \$1,448.50, besides interest.

The claimants, Ansel R. Cobb and Nelson Willard, who had, on special application, been permitted to intervene for their interests and to litigate the claim of the libellants, were mortgagees, holding separate mortgages, upon undivided moieties of the vessel. These mortgages were given to secure part of the purchase-money of the moieties covered by such mortgages respectively.

The mortgage under which Cobb claimed was dated April 14th, 1851, and that under which Willard claimed was dated on the 12th day of August, in the same year.

These mortgages had been severally duly filed as required by the laws of the State of New York, where the owner of the Hudson, the mortgagor, resided, and they had also been duly recorded in the office of the proper collector of the customs as required by the act of Congress.

The claimants set up by their answers, and it was conceded at the hearing, that there had been a forfeiture under each of these mortgages, by a breach of its condition, prior to the making of the contracts of affreightment and bills of lading under which the libellants claimed. It was also conceded that they had not taken possession under their mortgages, but that the mortgagor had continued in possession of the Hudson, and had run her on his own account until she was arrested under the process of this court in December, 1852.

It also appeared that the Hudson had been sold and the proceeds brought into the registry, and that the amount still remaining in the registry, though sufficient to pay the libellants' claim, was not sufficient to pay the claims of the libellants and claimants.

The opinion of the Court was delivered by

HALL, J. — The contracts made by the master of the Hudson, at the time he received on board his vessel the merchandise and property mentioned in the bills of lading proved in this case, and under which he was to receive the prior freight and charges which were a lien thereon, and

to pay over the same as mentioned in the several bills of lading, were unquestionably binding upon the master; and a suit against such master might, undoubtedly, under the circumstances of this case, have been sustained in the common law courts. This was not denied upon the argument, but it was claimed that the master, in respect to these prior charges, was the agent of the shippers and not of the ship owners; and that neither the ship *in specie*, nor the ship owners were bound to the performance of such contracts. On the other hand it was urged by the libellants that the ship owners and the ship were bound by the master's contract; and that the libellants were entitled to a decree for the payment of their whole claim out of the proceeds of the Hudson still remaining in the registry of the court.

In order to charge the owners personally upon such a contract, it is necessary for the libellants to establish the position that the contract was made by the master as the agent of the owners, and under their authority, either expressly given or tacitly conferred.

The general principle that the master of a ship, by the mere force and effect of his simple appointment as such, has an implied authority to bind them, without their knowledge, by contracts relative to the usual employment of a general ship, and also in respect to the means of employing her, is not only reasonable, and founded in just principles of commercial policy, but is too well established by authority to admit of controversy or doubt. 3 Kent, Comm. 161, 163; Abbott on Shipping, 124; *The Aurora*, 1 Wheat. 96.

The course of the usual employment of the ship is evidence of authority given by the owners to the master to make for them, and on their behalf, all the contracts relating to such employment, and, consequently, a contract so made by him is esteemed in law to have been made by them, and binds the owners as well as the master. Abbott on Shipping, 124.

In respect to most of the ordinary contracts of the master no proof of his authority to bind his owners, or that the contract relates to the usual employment of his ship, is required, because the universal usage and custom of the commercial world, give to the master full power to bind the owners of his vessel in respect to the matters to which such contracts relate. The authority of the master, in such cases, nevertheless, results from the general usage;

and proof of the usage and custom is not required, simply because the usage is so general, so well established, and so familiarly known in courts of admiralty, that they will take judicial notice of its existence, and of the master's authority under it.

The authority of a master to bind his owners may be extended by a well established usage and custom in respect to vessels engaged in a particular trade, or between particular ports; and, in such cases, the master, while acting in accordance with the usage and custom, is held to act within the scope of his employment, and his owners are liable for the faithful performance of every duty undertaken by the master in regard to property shipped according to the custom proved. And when it appears to be a part of the duty attached to the employment, and in the usual and ordinary course of business, for the master to sell the cargo for cash, and to bring back the money to the shipper, the owners are liable, although no commission or distinct compensation was to be received therefor. The freight of the cargo is the compensation for the whole service, and upon the violation of any portion of the entire contract a suit may be sustained against the owners of the vessel without other evidence of the master's authority, than such as results from the proof of the custom and of his appointment and acts as master. *Emery v. Hersey*, 4 Greenl. 407; *Kemp v. Coughtry*, 11 Johns. 107.

But to establish such custom it is not enough to prove, that the acts it is said to authorize have been frequently done. It must be shown to be so generally known and recognized that a fair presumption arises that the parties, in entering into their engagements, do it with silent reference to the custom, and tacitly agree that their rights and responsibilities shall be determined by it. *The Paragon*, Ware, 322. And this is especially true in a case like the present, where the contract made, in accordance with the custom and under its authority, is to affect the interests of persons not parties to the contract.

The proof of the custom in the present case is ample and conclusive, and under this custom and the authorities above cited, I think it may be considered as established that the owners of the Hudson were liable upon the contracts of the master contained in the bills of lading executed to the libellants, and on which this suit is prosecuted.

It is doubtless another question whether shippers are entitled to proceed *in rem* against the vessel for the defaults of the master when acting in the character of factor, or as agent of the shipper in any matter not directly connected with his duty and employment of master. *The Waldo*, Davies, 161. But that question is not presented in this case.

The master of the Hudson was not constituted the factor or agent of the libellants, in respect to the property shipped by them, nor was he invested with any discretion or authority to act as their agent, or in their behalf. His contract related exclusively to the ordinary and usual employment of his ship. The property shipped, and in respect to which the contract was made, was received from the libellants subject to their lien for their freight and charges, and it was for the purpose of obtaining the shipment of that property on board the Hudson for transportation, and thereby earning freight thereon, without advancing the charges which were a lien on the same, that he agreed to receive such property, subject to such charges, to deliver it only on the receipt of the amount of such charges, and to take and carry the money to be received for such charges to the shippers, or pay it over to the shippers' agents. If the prior freight and charges had been payable in railroad iron, and the contract had been to deliver the property shipped only upon the receipt of the railroad iron due for such charges, and to transport such railroad iron to the wharf of the shippers, and there deliver it for their benefit—and such railroad iron had been received and converted to the use of the master, there would have been little hesitation in saying that the vessel and her owners were liable, and yet I am unable to see any substantial difference in principle between the two cases.

In my opinion the contracts on which the libellants proceed, related solely to the ordinary and usual employments of the Hudson, and the master's authority to make these contracts, resulted under the custom and usage proved from his mere appointment as master. By the terms of these contracts, the master did not agree to act as the agent of the shippers, but he agreed as such master, that the subsequent delivery of the property shipped, which he was to make in the ordinary course of his employment and duty as such master, and which was necessary to be done as a condition precedent to his own right

to demand the payment of the Hudson's freight thereon, should not be made until he received the prior freight and charges due to the libellants, and that when he received such freight and charges he would pay them over to the shippers or their agents. In all this he was to act as master of the ship, and as the agent of her owners, in carrying out the contract of affreightment under which he received the property in the bills of lading mentioned, and not as the agent of the shippers. After the master had received the property shipped under this contract, the shippers had no longer any control over the property, or over the master in respect thereto. They could neither require the master to re-deliver the property, or to demand the payment of any larger sums for prior freight or charges than were provided for in the bill of lading; nor could they, in any manner rightfully direct or control the master in respect to any matter connected with the delivery of the property or the receipt of the freight. He had a right to deliver it, even in direct disobedience to the express orders of the shippers; being liable to the shippers only for the payment of the sum he had agreed to pay on account of their lien. It is therefore apparent that the master was in no respect the agent of the shippers, but was the agent of his owners, and that they were liable for his default.

Under the admiralty and maritime law of this country, there are some cases in which the master and owners are liable under the contracts of the master, while the ship *in specie* is not bound for the performance of such contracts. Such are the cases of contracts for materials and supplies furnished a domestic ship. But the law of this country, as well as the general maritime law, gives a lien upon the ship to secure the performance of the lawful contracts of the master in respect to the shipment and transportation of merchandise and property on freight. Chancellor Kent says, 3 Comm. 218, "And it appears very clearly, that by the general maritime law, a lien exist in favor of the merchant, who ships merchandise in a vessel on freight, against the vessel for the non-performance of the contract of affreightment under the bill of lading entered into by the master, in his quality of master, and that it may be enforced by process *in rem*. The ship itself *in specie* is considered as a security to the merchant who lades goods on board of her, and it makes no difference whether the vessel be in the employment of the owner directly, or be

let by a charter party to a hirer, who was to have the whole control of her," and so it was held by the learned judge of the Maine district in the cases of *The Rebecca*, Ware, 188; *The Phæbe*, Ib. 263; *The Waldo*, Davies, 161; and *The Casco*, Ib. 184. Indeed, by the general maritime law, every contract of the master, within the scope of his authority as master, binds the vessel, and gives the creditor a lien upon it as his security. *The Paragon*, *ubi supra*; Abbott on Shipping, 124.

The principle that the ship and freight are bound for the acts of the master, has been incorporated into the maritime jurisprudence of England, though from the limited jurisdiction of the admiralty, the shipper cannot have the full benefit of it. In this country the lien is not only acknowledged but enforced by our courts of admiralty, and having been borrowed from the general maritime law, or the customs and usages of the sea, we must look to them rather than to our own peculiar maritime jurisprudence for its true character and the cases to which it applies. *The Phæbe*, Ware, 263, 271. And the learned judge of the District Court of Maine, after tracing the principle of this lien back to its source, declares that it is by no means correct to say that the liability of the vessel is merely collateral or accessory to that of the owner. That on the contrary, in the origin of the custom the primary liability was upon the vessel. Ib. 270, 271. And it was declared in that case that whoever deals with the master, in all cases where he is acting within the scope of his authority as master, is entitled to look to the ship as his security. Ib. 271, 272. In accordance with that principle, it was held in the case of *The Phæbe* that the ship, although in the hands and under the entire control and management of a charterer, was liable to the shipper for 136 tons of gypsum, of the value of \$259.78, shipped on board the vessel for transportation from Eastport in Maine to Boston, and for which bills of lading were executed by the master under an agreement that the master was to have for his freight all the net proceeds of the sales of the gypsum over the sum above mentioned; the master, instead of carrying the gypsum to Boston, having stopped at Castine, transshipped it on board of another vessel, and wholly failed to deliver the gypsum to the consignees.

These authorities are sufficient to show that the ship, at least as against the owners, is liable *in specie*, for the per-

formance of such contracts as were made by the master in this case.

If the personal liability of the owners and the liability of the ship *in specie*, as against such owners, be fully established, there remains another and more serious question, and one which was more elaborately argued and quite as confidently urged by the learned advocates for the claimants. They insisted that the rights of a prior mortgagee, who had filed and recorded his mortgage as required by law, were paramount to those of a creditor holding a maritime lien created under a contract of affreightment made subsequently to the time of the execution, filing and recording of the mortgage; that a subsequent maritime lien, unless for seamen's wages or under a bottomry bond, was inferior and subordinate to the common law lien under the chattel mortgage; and that the common law right of the mortgagee could not be affected or displaced by a subsequent maritime lien and proceedings *in rem* founded thereon, prosecuted to a decree and sale in a court of admiralty.

To maintain their positions, the advocates for the claimants cited the cases of *The Kosciusko*, 11 New York Legal Observer, 38, and *The Angelique*, reported in the New York Times, decided by the learned judge of the Southern District of New York, and they claimed that those cases were directly in point, and fully established the doctrine for which they contended. The distinguished ability, eminent learning, and great experience of Judge Betts are well known and universally acknowledged in this district, and they deservedly give to his opinions almost the force of controlling authority in this court; but my preconceived opinions, adverse to the positions assumed here by the advocates for the claimants, had been so long and steadily entertained, that I was not prepared, on the argument and without further examination and reflection, to yield my assent to the doctrines which it is insisted, and no doubt properly insisted, are sanctioned by the cases cited.

In the case of *The Kosciusko*, it was held that the libellant had, under the general maritime law, a lien for certain supplies furnished the vessel within the district of New York, she then being owned in the State of New Jersey; and that the only defence to that portion of the libellant's demand depended upon the validity of the mortgage held by the claimant who had been permitted to

intervene and defend the suit. The mortgage in that case was held to be invalid, and the libellant's right to a decree against the vessel, and a priority over the claimant was declared; but it is insisted, and I am inclined to think with good reason, that the language of the court authorizes the inference that the learned judge would have declared that the mortgage lien was to be preferred, if the mortgage had been properly filed and recorded according to law.

I am not aware that any written opinion, containing a full statement of the views and reasoning of the court in the case of *The Angelique* has ever been published, but the newspaper report states "The court held," first, "that this court, proceeding on the instance side in actions by material-men, freighters and passengers, against the ship, had no authority to compel the mortgagees to submit their mortgage interest to the order of the court, or to take satisfaction therefor, even at its full amount, much less to order the discharge of its lien on the ship on payment to the mortgagees of less than the mortgage debt."

Second. "That the mortgagees never submitted themselves or their mortgage lien or debt to the jurisdiction of this court; but, on the contrary, appeared at the place and time of the marshal's sale, and gave notice of the subsistence of their legal incumbrance and right against the ship."

Third. "That had such a submission been made, the court of admiralty possesses no power over the creditors or their debts adequate to coerce the parties to an involuntary relinquishment or adjustment of their rights, or enabling it to fix a scale of equities between these numerous suitors, prosecuting distinct interests, or to compel any of them to forego their entire legal rights and remedies."

Fourth. "That the libellants establish no right of action against the fund in court as the *res* chargeable with their debt, and they are not entitled to arrest them, or partake in their distribution as remnants or proceeds of the ship on which they hold an incumbrance, because the court has never displaced that incumbrance from the ship, and because these proceeds are more than absorbed by decrees in court directly against the ship, and they do not, therefore, continue in court, nor are they at the disposal of the court as remnants, so that the court can take cognizance of the equities thereto as between the ship and his creditors."

Fifth. "That courts of admiralty have not inherently

the faculty to use chancery powers or processes to compel creditors to yield legal rights and give place to claims, clothed with no more than an equitable character; nor as a general principle, to act upon parties or interests not before it by regular course of suit; nor to coerce suitors pursuing by courts of law the remedies appropriate to the jurisdiction of the court; nor others, not parties before the court to submit to a marshalling of assets within the control of the court, for the purpose of putting equitable claims there-to on the same footing with maritime liens in suit, or legal rights."

Sixth. "That as a general principle, debts, resting on a maritime privilege alone, become incumbrances, and bind the *res* under lien when the same is attached thereon, and not before. Accordingly, suitors in admiralty take priority of satisfaction in lien debts in the order of the arrest of the property subject thereto, and not *pro rata*, nor in the order in which the debts were incurred, nor with reference to the time of indebtedment, except in the case of express hypothecation;" and that the court directed "that the lien creditors, other than the libellants, be paid out of the fund in court in the order in which their attachments were liened respectively, and when no attachment was served in suits under prosecution, then in the order in which the actions were instituted."

In this case of *The Angelique*, (as I understand the report given in the "Times,") the mortgagees were themselves actors, having filed a libel against the proceeds of the vessel, which then remained in the registry, for the purpose of obtaining a decree for their application in payment of the mortgage upon which the proceeding was founded.

The vessel had been previously sold under the decree of the court in favor of material-men. The mortgagees had attended the sale, and before the ship was bid off, gave to the marshal and to the bidders and purchasers at the sale, notice of their mortgage incumbrance, and insisted that the ship would still remain subject to their lien, notwithstanding such sale. This, as it has been seen, was one of the grounds upon which their right to a portion of the proceeds was denied; but the statement of the other points decided seems to warrant the conclusion that Judge Betts held that a prior chattel mortgage, duly filed and recorded, would not be affected or defeated by a sale under the decree of a court of admiralty, made in a suit brought to enforce a

maritime lien, which attached after the filing and recording of the mortgage — unless, indeed, the mortgagee voluntarily appeared, and submitted himself and his mortgage to the jurisdiction and decree of the court. The case, if I understand it, fully sanctions the doctrine, that such a sale does not extinguish or defeat the lien of such prior mortgage, and that a court of admiralty has no power, when such mortgagee fails to appear, to sell the vessel discharged from the mortgage lien, or to give, (what it has been generally supposed a purchaser obtained at such a sale,) a good title as against the world.

If I have properly understood the points decided in the cases of *The Kosciusko* and *The Angelique*, I cannot, after mature deliberation, assent to the doctrine of those cases. In my judgment, a court of admiralty proceeding *in rem* against a ship, on the instance side of the court, in suits prosecuted by seamen, material-men, bottomry bond holders, freighters, or others holding admiralty liens under the general maritime law, have a clear and undoubted right to decree, and do ordinarily decree, a sale of the ship free from all previously existing incumbrances, and that such a sale extinguishes the previously existing rights of all mortgagees, and of all others having common law or other rights or interests, in or to the same; and that the rights of such parties, after such sale, exist only against the proceeds of the sale; their only remedy being by application to the court for payment out of such proceeds in the order of priority which ought to be adopted in such cases. I confess that I can scarcely entertain a doubt, even after a careful examination of the cases of *The Kosciusko* and *The Angelique*, that such a sale extinguishes the lien of a mortgage, (unless the decree and sale are made expressly subject to the lien,) and that such lien is extinguished whether the mortgagee fails to appear in the court of admiralty, or appearing, peremptorily refuses to submit his claims and interests to the decision of the court, or to be bound by its decree; and I cannot but think, notwithstanding my high respect for the decisions of Judge Betts, that the decree and sale in the case of *The Angelique*, displaced, defeated and extinguished the lien of the mortgage held by the libellants in that case.

That the claims of a mortgagee are extinguished by such a decree and sale, may, I think, be quite satisfactorily established; not so much, perhaps, by adjudged cases, di-

rectly in point, as by the class of authorities which declare generally that such a decree and sale are binding upon all the world, and by the other class of authorities which establish the right of a mortgagee to intervene for the protection of his interest, and contest the claim of a libellant who proceeds *in rem* against a vessel to enforce a maritime lien. The cases in which mortgagees have been allowed to take from the registry the surplus proceeds of such sales, after all maritime liens were paid, must likewise be considered as sustaining the same doctrine.

It appears to be well settled in England, that the High Court of Admiralty of that kingdom possesses, in all cases of bottomry and salvage, and also in claims for wages, which are brought before it, undoubted power to decree a sale of the vessel proceeded against, unless the demand of the successful suitor be satisfied. The jurisdiction of the court in these matters is confirmed by the municipal law of that country, and by the general principles of the maritime law; and the title conferred by the court in the exercise of this authority, is a valid title against the whole world, and is recognized by the courts of England, and by the courts of all other countries. Edwards on Admiralty Jurisdiction, 90, 91; *The Tremont*, 1 W. Rob. 163.

The decree *in rem* binds all the world, and all parties may come in and intervene for the protection of their interests. Benedict's Admiralty, Sect. 364, 365, 434, 440; Abbott on Shipping, Perkins's Ed., 26, and note; Conkling's Admiralty, 556; *The Mary*, 9 Cranch, 126, 144; *The Neptune*, 3 Hagg. 132, 139; *The Attorney General v. Norstedt*, 3 Price, 97; *The United States v. Mangin*, 1 Pet. Adm. Dec. 452; *The Mary Ann*, Ware, 104.

The cases in which mortgagees have been allowed to intervene for their interests, and contest the claims of a libellant in admiralty, or to take the surplus of the proceeds of sale from the registry after all the maritime liens thereon have been discharged, are evidence that the courts by which such cases were decided supposed the mortgagee was bound by the decree, and that a decree and sale displaced and extinguished his lien upon the vessel itself. If his interests as mortgagee were not to be affected by the decree and sale, there could be no propriety in allowing him to intervene and contest the claim of a libellant, or in allowing him to take from the registry any portion of the

proceeds of a sale. If the sale could only be made subject to his mortgage lien he had no interest in contesting the claim of the libellant; and if a sale when made did not defeat his lien, but was necessarily made subject to its continuance, the surplus in the registry would belong, not to the mortgagee, but to the general owner; and the mortgagee should be left to enforce his prior and paramount right against the vessel mortgaged in the hands of the purchaser.

The following are some of the cases in which mortgagees have been permitted to intervene for their interest, and contest claims prosecuted against a vessel on which they held a mortgage. In a case of seamen's wages, though hesitatingly: *The Prince George*, 3 Hagg. 376. In cases of bottomry: *The Dunvergan Castle*, 3 Hagg. 229; *The Sloop Mary*, Paine, 671; *The Duke of Bedford*, 2 Hagg. 294, (and see Edwards on Jurisdiction, 91.) In the case of a material-man: *The Kosciusko*, 11 New York Legal Observer, 38; and see *The Fortitude*, 2 W. Rob. 217; *The Repulse*, 5 Notes of Cases, 348, 354; *The Mary Ann*, 4 Notes of Cases, 376. In the last case the suit prosecuted by the holders of a bottomry bond, was contested by the holders of a common law mortgage of prior date, and Dr. Lushington said:—"I apprehend as mortgagees the defendants have a right to impeach the validity of the bond (of bottomry) to the same extent, and in the same manner as the owners, subject, perhaps, to some distinctions in peculiar cases. But it is of importance, in this and all similar cases, to remember that the title of mortgagee, is a title derivative from the owners, and in no respect, as I conceive, superior thereto." In the case of *The Sloop Mary*, *ubi supra*, the claim under a subsequent bottomry bond, was preferred to a prior common law mortgage; the holder of the latter appearing and contesting the bottomry claim. And the same decision was made in the case of *The Duke of Bedford*, above cited.

The following are some of the cases in which mortgagees have been allowed to take from the registry surplus proceeds of sale after the maritime liens had been paid. *The New Eagle*, 2 W. Rob. 441; *The Neptune*, 3 Knapp's Privy Council Cases, 94; *Harper v. The New Brig*, Gilp. 552, 553.

In the cases of *The Portsea*, 2 Hagg. 84, and *The Exmouth*, Ib. 88, the surplus proceeds remaining in the

registry after the maritime claims were satisfied, were applied for by the representatives of the owners of the vessel sold, but the court refused the applications in consequence of the adverse claims of mortgagees. It is true the court did not direct the payment of the surplus proceeds to the mortgagees, but the reason for declining to make such payment was, that the court had then no jurisdiction (as it now has under the statute of 3d and 4th Victoria, Chap. 32) to determine controversies between the mortgagee and the representatives of the general owner, and the right of a mortgagee to the surplus proceeds was fully recognized by the refusal to direct the payment of that surplus to the representatives of the general owner, and continuing to hold them as against such representatives avowedly subject to such order as should come to the court of admiralty from a common law court, or court of equity, competent to settle the questions at issue between the mortgagee and the representatives of the general owner and mortgagor.

The power of a court of admiralty to sell a ship and her appurtenances, and to give a perfect title as against all common law and other liens, is also fully shown by the case of *The Flora*, 1 Hagg. 298. In that case the vessel had been seized by a sheriff by virtue of a *fiery facias*, and was in his hands at the time the warrant of arrest issued by the court of admiralty in a suit for seamen's wages was executed, and the decree in favor of the seamen being first satisfied, the surplus proceeds remaining in the registry were paid over to the sheriff to be applied upon the *fiery facias*.

In the case of *The Harmonie*, 1 W. Rob. 178, the sails of a ship, which had been arrested under the warrant of arrest issued by the admiralty, under the provisions of the Act of 3d and 4th Victoria, for necessities supplied to the vessel, were in the possession of a sailmaker, who had a common law lien therefor for repairs, and claimed to hold them against the process of the court. A monition was moved for and granted for the purpose of compelling the sailmaker to deliver up the sails to the person in possession of the ship under the authority of the court, and in making this decision the court said:—"Undoubtedly the sailmaker has a lien upon these sails to the amount of the repairs he has effected; and under the general law he would be justified in retaining possession of them until his debt is paid, against the owners or others seeking to dispossess him.

As against the authority of this court, however, he has no right to detain them when the ship is in possession of its officer under a warrant from the court. The court can protect the sailmaker in his just rights."

The cases cited are deemed sufficient to establish, by authority, the position that the mortgage lien is extinguished by a sale under the decree of a court of admiralty, but if we look to the nature, origin and objects of admiralty liens, and the principles of commercial policy in which they originated, and by which they are still upheld, it will be seen that these cases are in affirmance of the general principles which have been adopted and maintained in the maritime courts of this country and Europe.

The writer of an elaborate essay on the "Peculiarities of Maritime Liens," first published in the Law Magazine (English) for November, 1852, and reprinted in the Monthly Law Reporter, vol. 15, p. 556, says, that the "Origin and *rationale* of the maritime lien are equally plain and obvious. At a period when a registry of shipping was unknown, the difficulty of ascertaining the names and residences of the owners of the vessel against which the plaintiff (whatever might be his cause of action) was interested, would have been insuperable. In our own times, where such registry does exist, the practical difficulty of ascertaining all the precise and accurate facts which are required to be known before a personal action can be brought in the form which the law necessitates is very considerable. In the case of foreign vessels it would of course amount to perfect irresponsibility or impunity on the part of their owners. No other course to protect and indemnify with facility and completeness, the suitors for wages, salvage, bottomry or damage could be imagined or contrived, but the maritime lien and its accompanying process *in rem*." *Ib.* 557, 558. And again: "In the first place, a maritime lien is a debt privileged to be paid out of the *res ipsa*, i. e. the ship or its incidents, the cargo and freight; the condition of the privilege being that the debt shall have arisen out of such a transaction connected with the *res* as is cognizable in that court, *e. g.* wages, pilotage, towage, bottomry or damage. With these maritime liens no other debt, not even a mortgage of the vessel itself can compete; (*The Orelia*, 3 Hagg, 83; *The Hersey*, *Ib.* 407, 408;) but the court of admiralty, with an entire disregard of their existence, whatever their number or

amount may be, will sell the *res* to discharge its own peculiar liens. Nor can any other court either possess itself of the vessel, or even retain possession of it in satisfaction of debts of its own cognizance, so long as the court of admiralty has liens to enforce."

When once the vessel has been arrested by the admiralty, no other tribunal can take it out of its custody; (*The Westmoreland*, 4 Notes of Cases, 174;) and it is only the clear balance that may remain in its hands, after the full payment of the maritime liens, that is subject to or available in respect of other debts, even in the case of the bankruptcy or insolvency of the owner of the vessel. A common law lien upon the *res* cannot be set up and maintained against a maritime lien when the *res* is about to be sold under the process of the admiralty, but that court, at the same time that in such a case it will forcibly dispossess those who claim to hold a vessel or her sails by virtue of a lien of that kind, (for example, dock and harbor dues, repairs or warehouseing,) will protect such persons in their just rights by paying them the amount of their respective debts out of the proceeds of the sale of the *res*. *The Harmonie*, 1 W. Rob. 178.

Courts of admiralty and writers upon maritime law use the terms "maritime lien." *The Globe*, Monthly Law Reporter, vol. 15, 451, Essay on the peculiarity of Maritime Liens, Ib. 555 - 557, 590, &c.; Conkling's Admiralty, p. 60, "Privileged Debts;" *The Paragon*, Ware, 322, Essay, &c.; Monthly Law Reporter, vol. 15, 556, 557, "Implied Liens of Privileged Creditors;" *The St. Jago de Cuba*, 9 Wheat. 409, "Implied Hypothecations;" *Justin v. Battam*, 2 Ld. Raym. 805, "Privileged Hypothecations;" *Skoffield v. Potter*, Davies, 392, "Privileged Lien;" Ib. and *The Jerusalem*, 2 Gall. 350, "Tacit Hypothecations;" Emerigon, *Contrats a la Grosse*, G. R. Sec. 2; *The Rebecca*, Ware, 212, "A Lien by the General Maritime Law;" *The Paragon*, *ubi supra*; *The Spartan*, Ware 134, "A Privilege Against the Ship;" *The Rebecca*, Ware, 199, "A Lien on the Vessel;" *The Rebecca* and *The Paragon*, *ubi supra*, and other similar language, to express substantially the same idea.

They all imply the existence of a privileged debt or demand, and of a maritime lien to secure its payment.

This lien is given according to the general maritime law, and by that law the ship is considered as hypothecated to the privileged creditor in such a manner as to authorize

her arrest and sale under the process and decree of a court of admiralty, at the instance of the creditor, and the application of the proceeds of such sale to the payment of the privileged debt.

The object of allowing these maritime liens is to give credit to the ship, and therefore these liens, as a general rule, bind all prior interests. This is so not only in respect to common law interests, but it is usually so in respect to previously existing maritime liens; the general rule adopted by courts of admiralty in settling the preference or right of priority of maritime liens giving preference to those of latest date. For the rule by which that priority is determined, requires that the demand or service for which that privilege is claimed be posterior in date to other liens. The ground of this inversion of rule is just and obvious. In the hazardous trade of the sea, the services performed at the latest hour are most efficacious in bringing the vessel and her freightage safely to their final destination. Each foregoing incumbrancer, therefore, is actually benefitted by means of the succeeding incumbrance, and the equity of the court of admiralty in adjudicating cases of conflicting liens of this nature takes that as the principle of its decisions. *Monthly Law Reporter*, vol. 16, p. 4.

In the case of *St. Jago de Cuba*, *ubi supra*, Mr. Justice Johnston said:—"The whole object of giving admiralty process and priority of payment to the privileged creditors, is to furnish wings and legs to the (in that case) forfeited hull to get back for the benefit of all concerned; that is, to complete her voyage."

"It is not in the power of any one but the ship master, not the owner himself, to give these implied liens in the vessel, and in every case the last lien will supersede the preceding. The last bottomry bond will ride over all that precede it, and an abandonment to a salvor will supersede every prior claim."

In the case of *The Dowthorpe*, 2 W. Rob. 79, Dr. Lushington is reported to have said:—"It cannot for a single moment be denied that a ship, in whosoever hands she may be, or whoever has an interest in her, is liable to liens subsequently accruing, such for example, as salvage, bottomry bonds, and seamen's wages. These are liens upon a ship in the strictest sense of the term; and those persons who take a vessel as security, must take it subject to the incumbrances which the law may impose upon it for the benefit of third parties."

These incumbrances are imposed for the benefit and encouragement of trade and commerce, and to enable the ship to obtain credit and business where her owners are unknown, or have no personal credit, and the reason and policy which gives these maritime liens as against the general owner and a subsequent *bonâ fide* purchaser without notice, and as against prior maritime liens of a similar character, apply with equal force to a case like the present. No very substantial reason has been urged why a mortgagee who allows the owner to remain in possession of the vessel mortgaged and employ it in navigation, even after forfeiture, should be placed in a better position as against seamen, bottomry bondholders, material-men and freighters, than a subsequent *bonâ fide* purchaser without notice, or prior holder of another maritime lien. A mortgage is but a conditional sale, and where the mortgagee permits the mortgagor to remain in possession of the vessel and employ it in navigation, he doubtless does so to enable the mortgagee, with the profits of such employment, to redeem his mortgage. He thus expects to participate, indirectly, in the earnings of the vessel. And when the vendor of a vessel gives credit for the purchase money, and stipulates to allow the purchaser who gives a mortgage to secure its payment, to use the vessel for the purpose of earning the means of paying off the mortgage, he secures to himself a larger price for his vessel, and should be affected by such liens as the master, the representative for this purpose of all parties interested in the ship, finds it necessary to create to ensure the profitable employment of the ship in the due and ordinary course of its business.

The principle contended for by the claimants would give to the mortgage lien a superiority over bottomry bonds, the claims of material-men, and the holders of other maritime liens of even date; for the latter are subject to other maritime liens of the same character, subsequently accruing, while the mortgage lien is claimed to be substantially indelible.

If the mortgage is thus to be preferred, how is a ship to obtain credit in a foreign port where the parties who might be willing to supply her necessities if made secure, can by no possibility of means, determine whether she is not mortgaged to her full value in the country where she belongs? And if it be established that the decree of a court of admiralty and a sale under it give no valid title as

against a prior mortgagee, who will bid any thing like the full value of a ship offered for sale under such a decree? When it is once established that the right of a purchaser under such a decree is liable to be wholly defeated by a chattel mortgage, registered, filed and recorded in another country, but in respect to which, or in respect to the existence or non-existence of such mortgage, he has no means of obtaining any seasonable or reliable information, the utility and value of the maritime lien will be so far diminished, that I should doubt the policy or expediency of preserving its form after its substance had departed. Once establish this doctrine and the real owners of many, not to say most, of our vessels may be persons of wealth holding chattel mortgages thereon, while the nominal owners appearing upon the registry of the custom house, are persons of no responsibility, willing, because they have little or nothing to lose, to subject themselves to all the risks which those engaged in commerce necessarily assume.

Having heretofore discussed the question of preference among maritime liens, and incidentally their character and objects (in the case of *The America*, Monthly Law Reporter, vol. 16, p. 264,) I do not propose now to pursue that discussion, but to say that I adhere to the opinions there expressed, and that the cases in our own and the English courts, then or now referred to, are in my judgment sufficient to establish the position that every creditor, who holds a maritime lien upon a ship or vessel as a security for his debt, has a "privileged debt," secured by the "hypothecation" of the vessel. These terms, "privileged debt" and "hypothecations," have a known and fixed meaning, both in the maritime and civil law, and if they did not have their origin in the civil law, in which it has been frequently suggested the implied hypothecation of the maritime law had its origin, they have the same effect and definition in the maritime and civil law.

The learned Judge of the Maine District, whose research and learning entitle his opinions to the highest respect, evidently inclines to the opinion that the maritime lien had its origin in the maritime usage of the middle ages rather than the civil law. However this may be, the privilege and the hypothecation are both well known and well defined terms of the civil law, and the precise character and effect of the marine hypothecation of a ship which secures the payment of a privileged debt against it, may, I

think, be very satisfactorily ascertained by a reference to the civil law, where it treats of privileges and hypothecations.

For the doctrines of the civil law on these subjects I shall refer to Domat, (Little & Brown's edition,) sections 1732, 1736, 1738, and 1769.

Sec. 1732. "We must distinguish between three sorts of creditors: those who have neither mortgage nor privilege, such as he who has only a bare promise for money lent; those who have a mortgage without a privilege, as he who has an obligation for money lent, passed before notaries public; and those whose credit has some privilege that distinguishes their condition from that of other creditors, and which gives them a preference to those whose credit is prior to theirs. Thus he who has lent money to buy a house or repair it, is preferred as to that house before other creditors of the same debtor, although they have mortgages on it which are prior in date." Vol. 2, p. 680.

Sec. 1736. "The privilege of a creditor is the distinguishing right which the nature of his credit gives him, and which makes him to be preferred before other creditors, even those who are prior in time, and who have mortgages." *Ib.* 681.

Sec. 1738. "All the privileges of creditors have this in common, that the least of them gives the preference before creditors who are such only by writing, or by mortgage, and others who have no manner of privilege. And among those who are privileged there are some who have the preference before others, according to the different qualities of their privileges." *Ib.* 681.

Sec. 1769. "It follows from all the preceding" (contained in the sections above quoted and others,) "that among creditors there are three orders. The first is, of those that are privileged, who go before all the others, and take place amongst themselves, according to the distinctions of their preferences. The second is, of those that have mortgages who have their rank after the privileged creditors, according to the dates of their mortgages. And the third is, of creditors who have only personal actions, who not being distinguished either by privilege or mortgage, come in therefor jointly together, and share equally in proportion to their debts." *Ib.* 694.

Perhaps it was not strictly necessary in this case to resist the authority or criticise the doctrines of the cases of *The*

Kosciusko and *The Angelique*, for it strikes me that if the doctrines of those cases are carried out, their legitimate results must necessarily be to exclude the claimants from any participation in the proceeds of the sale of the Hudson. If the lien of the claimants' mortgages still exists in full force, notwithstanding the sale, if the Hudson was in law and fact actually sold subject to that lien, there can be no propriety in giving these claimants a portion of the proceeds of such sale, to the total or even partial exclusion of those who had maritime liens upon the vessel, and which, it is conceded, have been displaced and defeated by the decree and sale. I have preferred, however, to examine the questions which have been discussed, rather than to rely upon the ground just stated as the basis of my decision, for the reason that these questions are of great practical importance to those engaged in the commerce of the lakes. After a deliberate consideration of these questions I have, with some hesitation and reluctance, determined it to be my duty to dissent from the opinions of the learned Judge of the Southern District in the cases of *The Kosciusko* and *The Angelique*, and I should have felt still more reluctant in doing so, if there had not been a higher tribunal before which my decision can be taken for revision. And I sincerely hope that the claimants will take this case to that higher tribunal, that the important questions involved may be finally determined and settled by the appellate court.

The clerk will enter a decree for \$1448.50 and interest, from the 28th Nov. 1852.

Abstracts of Recent American Decisions.

Supreme Judicial Court of Massachusetts, Suffolk, ss., March Term, 1854.

Accord and Satisfaction — Contract — Insolvent Debtors — Condition. Contract to recover certain notes and an account. Defence, discharge and satisfaction, by force of an indenture between the defendants of one part, the plaintiffs and other creditors of the defendants of another part, and certain trustees of a third part, for the benefit of the plaintiffs and other creditors. To which the plaintiffs replied, that the indenture was not a satisfaction, and averred that real estate referred to in the indenture as conveyed by the debtors to the trustees, for the benefit of the plaintiffs and others, was under incumbrance, and was afterwards set off on execution, pursuant to an attachment existing thereon when the conveyances thereof to the true-

tees were made. The plaintiffs offered evidence of incumbrances, and the defendants, that the estate set off on execution was afterwards by meane conveyances transferred to the trustees for the purposes of the assignment. The indenture purported to be a present conveyance of real and personal property; the real, as described in conveyances then made, and the personal as described in a schedule annexed, with covenants for further assurance. The trustees were to hold the property two years, but the assignors were to remain in the possession and management of the property, but not to sell any part thereof without the consent of the trustees. The debtors stipulated to pay forty per cent. of their debts in two annual instalments, and the creditors agreed to accept the forty per cent. if so paid in full satisfaction, and in that case the remainder of the assigned property was to be returned to the assignors. If the forty per cent. was not paid by the debtors in two years, the assigned property, or such part of the same as should be then remaining salable, was to be disposed of by the trustees, and the proceeds applied to the payment of the forty per cent., and the surplus, if any, restored to the assignors. The stipulations on the part of the creditors were, that they would accept forty per cent. during the two years from the debtors; or if forty per cent. should not be paid by the debtors, they would accept this conveyance [or these conveyances], and the securities hereby given, in full satisfaction and discharge of their said claims; that upon receipt of said forty per cent. they would execute and deliver to the debtors good and sufficient releases of said debts, as also at the expiration of said two years, in the case the debtors should fail to pay said forty per cent. at the expiration of said time: *provided* the trustees should perform every thing necessary to effect a sale of said property. The next clause was as follows — “And they (the creditors) do hereby for themselves, severally and respectively, and for their several and respective executors, administrators, partners and assigns, accept said property and covenants in full satisfaction and discharge of all such their respective debts and demands against said parties of the first part as are not otherwise secured.” A subsequent clause provided, that it was understood by the parties that the non-performance by the debtors of any of their covenants, saving those that related to the conveyance of their property, should not operate as the breach of any condition by which they should forfeit their rights under this agreement, and such non-performance should not prevent this release from becoming operative and effectual. It appeared by the instrument itself that all the real estate contemplated to be conveyed was embraced in a deed executed simultaneously with the indenture, while all the personal property passed by force of the instrument itself.

Held, (1). That the assignment was not void as contrary to Stat. 1836, c. 238, and the Insolvent laws, but voidable only, and could be avoided only by a creditor or other person not a party to it, and as in this case no act had been done having any tendency to avoid it, the parties, including the plaintiffs, were bound by it. (2). That if the word *provided* constituted a condition, it seemed to be a condition to the creditors' stipulation to execute and deliver a release, and it could not be presumed, unless upon some express words to that effect, that the debtor's right to a discharge should depend on the conduct of the trustees who were as much the agents of the creditors as the debtors, and were bound to both, but construed strictly, it was only a condition on which the creditors stipulated to execute and deliver a formal release. (3). That the stipulations were not mutual and dependent, but though mutual, absolute, unconditional, and independent, and the conveyances having been made, there was no condition, express or implied, to prevent the discharge from being absolute; and that the

remedy of the plaintiffs if the debtors had failed to perform any executory stipulation against incumbrances, or for further assurance, or otherwise, was by an action on the covenants, for their use, in the name of the trustees. And that the accord and satisfaction effected by the indenture, the agreement to receive and accept certain property and covenants in full satisfaction and discharge of the said notes and other debts, was a good legal defence and bar to this action. — *Bigelow v. Baldwin.*

Action — Contract. Contract for work done and materials furnished, in repairing a house and outbuildings belonging to the defendant. Defence, that the plaintiff made a certain contract, that all which had become due under it had been paid, and that the only other payment to be made under said contract never became due and payable, because the same was to be paid when said repairs should be finished; and that, before the completion of said repairs, the said buildings were destroyed by fire. It appeared that all the work done and materials furnished by the plaintiff, were under and in part performance of a written contract, and that, in pursuance of said contract, the plaintiff was proceeding with reasonable diligence, when the further prosecution of the repairs was prevented by the fire; that, the day previous to the fire, the plaintiff had nearly completed the repairs upon the main house, and the defendant took possession of, and occupied the same; that, at the time of the fire, the outbuildings had not been repaired; that such repairs constituted a substantial part of the work to be done, and the materials to be furnished under the contract, and had never been done and furnished by the plaintiff, by reason of the destruction of the buildings as aforesaid. *Held*, that the fire was a sufficient excuse for the non-completion of the repairs, and that the plaintiff was entitled to recover for that part of the work done by him which the defendant had entered upon and enjoyed. — *Lord v. Wheeler.*

Condition — See Accord and Satisfaction.

Contract — See Accord and Satisfaction — Action — Evidence.

Distraining cattle damage feasant — Memorandum of cause, &c. These were actions of tort, to recover the value of certain cattle, which the defendant, a pound keeper and field driver, duly appointed by the City of Boston, impounded at the request of D. B., who distrained said cattle. The plaintiffs charged defendant with impounding their cattle unlawfully and without authority, to which the defendant replied that he was authorized to impound said cattle, by the distrainer, who gave him a memorandum of damages, and a written request to impound said cattle as damage feasant, of which the following are copies:

1851, Sept. 26. Bell Ile.

Mr. Briggs by agent order Mr. Devinney request you to come to bell ile take charge neat stock or cattle. E. Boston cattle continually troubling bell ile great expence the time of men drive out field —

D. BEXSON.

1851, Sept. 26, E. Boston.

The damage for 9 head cattle at bell ile 50 cents each for the agent, D. BEXSON.

The first notice or statement was sent to the defendant, who thereupon sent for the cattle, and then received the second statement. The defendant contended that the above notice and memorandum were sufficient to justify him in impounding the said cattle, and demanding of the owners, as a condition of their surrender, his own fees of fifty-four cents per head, and also fifty cents per head for damages, in accordance with the requisitions of the 113th chapter of the Revised Statutes, sections 4, 5, 6, and 7. But it was *held*, that the memorandum and notice aforesaid, were insufficient to justify the defendant in impounding said beasts, and were not in accordance with the regulations of the statute; that the

memorandum required by the statute, was the pound-keeper's only warrant for retaining the cattle in a case like the present, and if he undertook to hold them without, he had no legal justification. — *Burnett v. Briggs; Kelley v. Same.*

Evidence — Contract. Assumpsit for the manufacturing of two gold-washing machines. Defence, that they were not furnished on the defendants' account and credit. There was no express contract, but the plaintiff relied on various acts of the parties in reference to the machines, and among other things, that the plaintiff was at the defendants' store at different times, and there examined and measured for imitation a pattern machine. It appeared in evidence that these machines were taken from the plaintiff's shop, but by whom or by whose order, was not shown by the plaintiff's evidence; but from other evidence it appeared that they were taken from the shop by a teamster under the direction of one Smith, who worked for R. N. & M. In reply to the evidence of the plaintiff, the defendants offered to prove that the machine in the store which was the pattern machine already spoken of, was the property of said Smith, and was placed in the defendants' store as a pattern machine to sell on commission; but this evidence was rejected by the Court of Common Pleas as immaterial. The defendants offered to prove that at about this period of time said Smith made a contract with the defendants to furnish them with a lot of gold-washing machines of a pattern which he had got up to sell on commission, the defendants to receive a commission for selling, and that said pattern machine was put in the store of the defendants by said Smith in pursuance of said agreement, as a pattern, and that it was Smith's machine, and that he was to furnish the defendants with more machines of like description. This evidence was also rejected. *Held*, that had there been proof of any express contract on the part of the defendants with the plaintiff for the construction of the machines, the proposed evidence would have been properly excluded as immaterial. But it was further *held*, that as the defendants were to be charged, if at all, solely upon a promise by them to pay for these machines to be raised by the proof of certain circumstances which unexplained might properly lead to that result, it was open to the defendants to rebut the testimony of the plaintiff by proving other facts and circumstances tending to show that these machines were made for another person, and on his credit, and that they were merely interested as commission merchants to make sale of such machines as such third person should send to their store to sell, and upon the whole evidence the jury must find upon whose credit or on whose account the plaintiffs made the machines.

Said teamster testified that about the time specified, at the request of Smith, he went to a shop in Beverly Street; (witnesses for the plaintiff having testified that they worked during the period covered by his account annexed upon the machines at a shop in Beverly Street, and that the machines were taken from the shop, where they were manufactured, by some teamster) called for Smith's gold-washing machines, got two machines, and deposited them on the side-walk in front of defendants' store, and that subsequently, on the same day, he took them from the side-walk and returned them to said shop. On cross-examination, he was asked how he knew the person who sent him for the machines was Smith, who worked for R. N. & M. He said he previously went to R. N. & M.'s at the request of defendants, and got a gold-washer of Smith, and took it to defendants' store. This answer was received as evidence without objection by either party, and thereupon the defendants claimed that they had a right on re-examination to ask the witness what kind of a machine that

was, and where got. To which the plaintiff objected, and the objection was sustained; but it was now *held*, that the question was allowable. — *Moulton v. Parker.*

Execution — Writ of Entry. The demandant was committed on an execution. An *alias* execution was taken out against his goods and estate, and he was thereafter released; and the *alias* execution was subsequently levied on the demanded premises, which were sold by the sheriff to the tenant who purchased in good faith for a valuable consideration without notice. *Held*, that the *alias* execution was void, because it was issued while the debtor was still held upon the first; that the levy was therefore ineffectual, and the demandant entitled to recover as against the tenant. — *Kennedy v. Duncklee.*

Insolvent Debtors — See Accord and Satisfaction.

Insolvents in Massachusetts.

Name of Insolvent.	Residence.	Commencement of Proceedings	Name of Commissioner.
Andrews, Seth	Worcester,	April 13,	A. H. Bullock.
Baker, Edward	Worcester,	" 12,	A. H. Bullock.
Belding, David, et al.	Ashfield,	" 5,	David Aiken.
Boyd, John E.	Boston,	" 11,	John P. Putnam.
Bragg, Henry	Attleborough,	" 23,	E. P. Hathaway.
Brown, James, Jr.	Milford,	" 4,	A. H. Bullock.
Clapp, Charles C. et al.	Worcester,	" 15,	A. H. Bullock.
Cole, Charles D.	Boston,	" 21,	Charles Demond.
Coleman, Perez G.	Hubbardston,	" 7,	Charles Brimblecom.
Crosby, John	Chelsea,	" 10,	Charles Demond.
Cunnabell, James H.	Mendon,	" 13,	A. H. Bullock.
Cunningham, Nath'l F. et al.	Boston,	" 17,	John P. Putnam.
Cunningham, Geo. A. et al.	Boston,	" 17,	John P. Putnam.
Downer, Barney T.	Charlestown,	" 5,	Asa F. Lawrence.
Eaton, Edward F.	Milton,	" 19,	Francis Hilliard.
Eveleth, William et al.	Boston,	" 17,	John P. Putnam.
Field, William T.	Boston,	" 24,	John P. Putnam.
Forbes, Simeon B.	Haverhill,	" 14,	John G. King.
Freeman, Sanford	Harwich,	" 8,	Timothy Reed.
Friend, Richard, Jr.	Boston,	" 8,	John P. Putnam.
Gardner, Jonathan	Oxford,	" 20,	C. H. B. Snow.
Hastings, Wellington, et al.	Ashfield,	" 5,	David Aiken.
Hay, Ira	Stoneham,	" 28,	Asa F. Lawrence.
Holbrook, Amos	Sturbridge,	" 25,	A. H. Bullock.
Holmes, Charles	Quincy,	May 6,	Samuel B. Noyes.
Knight, William	Templeton,	April 14,	Charles Brimblecom.
Knowles, Zacheus, Jr.	Truro,	" 27,	Charles Demond.
Little, Charles W. et al.	Boston,	" 4,	John M. Williams.
Lydston, William	Charlestown,	" 22,	Isaac S. Morse.
Manchester, Edward B.	Roxbury,	" 19,	Francis Hilliard.
Mana, Cyrus S.	Stoughton,	May 17,	Samuel B. Noyes.
Mason, Joseph L.	Boston,	April 27,	John P. Putnam.
Norton, Sarah	Cambridge,	" 20,	Asa F. Lawrence.
Osborne, John et al.	West Cambridge,	" 4,	John M. Williams.
Page, Moses C.	Stoughton,	" 12,	Samuel B. Noyes.
Perkins, Rodney D.	Topsfield,	" 10,	John G. King.
Perry, Jonathan	Abington,	" 14,	Welcome Young.
Poor, Charles	Charlestown,	" 18,	Asa F. Lawrence.
Porter, Alvan, Jr.	East Bridgewater,	" 12,	Welcome Young.
Rogers, Walter M.	Milford,	" 5,	A. H. Bullock.
Simonds, Warren A.	Cambridge,	" 10,	Asa F. Lawrence.
Spaulding, Samuel W.	Charlestown,	" 19,	Isaac S. Morse.
Spinney, Charles C. et al.	Worcester,	" 15,	A. H. Bullock.
Thayer, Perry	Worcester,	" 28,	A. H. Bullock.
Welch, Samuel S.	Boston,	" 29,	Charles Demond.
White, Stephen	South Hadley,	" 13,	Haynes F. Chilson.

THE

MONTHLY LAW REPORTER.

JULY, 1854.

THE WARD TRIAL.¹

UPON the 2d of November, 1853, in a school-room in a public street in the city of Louisville, in broad daylight, in the presence of a large number of pupils and their instructors, Matthews F. Ward, a son of one of the most respectable inhabitants of that city, accompanied by his brother, Robert J. Ward, Jr., armed with a bowie-knife, took the life of William H. G. Butler, the principal of the school, by shooting him through the body with a pistol. The high previous character of all the actors in this tragedy, some of whom are not altogether unknown in this section of the country, the atrocity of the homicide, which, from the first accounts of it, seemed to be a cold-blooded, deliberate and cruel assassination, created not only in Kentucky, but throughout the United States, a deep and absorbing interest.

The excitement subsided, at least in localities remote from the scene of the slaughter, as soon as it was understood that Ward and his brother had been arrested, and in due course of law would be indicted and tried for murder.

¹ A Full and Authentic Report of the Testimony on the Trial of Matt. F. Ward, certified to be correct by Thomas D. Brown, Clerk of Hardin Circuit Court; William Alexander, former Commonwealth Attorney for the Hardin District; and Judge Alex. Walker, of New Orleans;—with the Speeches of Gov. Crittenden, Gov. Helm, T. F. Marshall, Esq., and Nathaniel Wolfe, Esq.; and the reply of Alfred Allen, Esq., Attorney for the Commonwealth. Reported by A. D. RICHARDSON. New York: D. Appleton & Co., 346 and 348 Broadway. 1854.

The public seemed willing to suspend its judgment until judicial investigation should afford the means of deliberate and intelligent opinion upon the merits of the case. The people of Kentucky, more familiar with *affairs* of this nature than the citizens of those regions where the "code of honor" does not prevail, reposed apparently upon the integrity and ability of their courts, and upon the inclination of these tribunals to administer justice. Although the excitement in Louisville seems never to have entirely subsided, so far as our knowledge extends, it was much moderated by the expectation and the hope that an impartial trial would vindicate the demands of public justice, and reassure the sense of private security which a homicide thus publicly perpetrated upon a highly esteemed and well-known individual, naturally in some degree tended to disturb.

Upon the 18th day of April, 1854, Matthews F. Ward, jointly indicted with his brother Robert for the murder of Mr. Butler, was placed upon his separate trial before the Circuit Court for the County of Hardin, at Elizabethtown, the Hon. J. W. Kincheloe presiding; the venue having been changed from Jefferson County, in which Louisville is situated, on account of the prejudice against the prisoners supposed to exist there. Thirteen counsel were engaged in the cause, of whom four appeared for the Commonwealth, and nine for the prisoners. The trial extended through nine days, during which eighty-seven witnesses were examined, of whom sixty-six were for the defence. Amongst the latter were the father and mother of the prisoner, *the brother who was jointly indicted*, the widow of the deceased, and thirteen of his pupils, of ages varying from fourteen to twenty years. Four days were consumed in the examination of witnesses, and four more in the "speeches" of counsel, of which four were for the prisoner, and four for the government. The case, after a charge from the presiding judge which might have occupied ten minutes in the delivery, was committed to the jury at five o'clock in the afternoon of the eighth day, and at the opening of the court on the ninth day, the jury returned their verdict of "Not guilty." Matt. F. Ward was accordingly discharged, "borne from the room in a fainting condition," and a *nolle prosequi* entered upon the indictment against his brother.

The announcement of this verdict created in Louisville

the most intense indignation. The jury, the prisoner, the "swift witness" for the defence, and even some of the counsel, were burnt in effigy. Mr. Ward's house, prudently vacated, was attacked by a mob and injured by fire. A public meeting was held, in which the trial and the parties concerned in it were severely denounced, and resolutions sympathizing with Mr. Butler's family passed. This meeting was remarkable not only for its extraordinary numbers, being the largest ever held in Louisville, but equally so for the character of the persons who composed it and directed the proceedings. It was not a tumultuous mob, nor assembled by persons ever ready to take advantage of any occasion of public excitement. It was mainly constituted of, and altogether directed by, intelligent, educated and influential citizens, who appeared to feel, with solemn conviction, that the verdict had done foul wrong to the name and honor of Kentucky, and had converted the proceedings of justice into a contemptible farce. By a not unnatural process of mind, this deeply-seated, irrepressible indignation, turned itself against the prisoner's counsel, and especially against the distinguished gentleman who volunteered his services. To the eloquence and ability of this gentleman, as well as to his high standing and commanding character, the result of the trial, though with no sufficient reason, seemed to be mainly attributed. Deputations and addresses from all parts of the State have urged him to resign his seat in the U. S. Senate; a society in a neighboring State withdrew its invitation to him to officiate upon some public occasion; a convention of medical gentlemen at St. Louis, who, before the trial, would have deemed themselves honored by his presence, so far forgot their self-respect as openly to insult him.

The "amiable and interesting young gentleman" who had been the "unfortunate cause" of Mr. Butler's death, did not escape similar demonstrations of popular anger. His own State was no longer a safe place of residence, and he left it. Returning to his native city, after a few months' absence, he is again compelled to flee. Steamboat captains are unwilling to convey him; hotel-keepers refuse to harbor him; towns warn him to leave their limits; even Arkansas, not entirely unaccustomed to the lawless use of the pistol and the bowie-knife, prefers that he should not remain within her borders. The curse of Cain cleaves to him. He is a fugitive and a vagabond in the earth, pro-

claimed, wheresoever he wanders, in tones of stern condemnation and with demonstrative unanimity, an acquitted felon.

Whence arises this long continued and unmistakeably sincere indignation? How happens this extraordinary condemnation by Kentuckians of their bar, their jury, and their courts? Whence arises what Matthews Ward's friends — for he still possesses some personal friends — characterize as relentless persecution? The cause must be sought beyond the character and standing of the individual or his family; beyond those of his victim — beyond even the atrocity and boldness of the crime.

A mild, amiable, and peaceable Christian, but still courageous and determined man, whose misfortune caused him to take life justifiably in self-preservation, whose conscience accuses him of no crime, who patiently submitted to five months' imprisonment without a murmur, who manfully stood his trial and was triumphantly acquitted, would endure more quietly the pains of incarceration, the agonies of suspense, the torments of a trial, than the manifestations of horror and loathing which meet him wheresoever he turns. Such detestation is especially hard for him to bear, as it seems to be deeper and the more unequivocally expressed by those in whose immediate neighborhood he had acquired the splendid character which was proved upon his trial. In the supplicating tone of a deeply injured and persecuted man, he addresses from New Orleans a card "to the editors of newspapers in the United States, requesting their silence until after the report of his trial shall be published in New York." To this he confidently appeals as containing his perfect vindication. To the public judgment, formed after a perusal of this report, he is probably willing to submit. It is prepared by his own friends, with a view of showing that, though undeniably great the misfortune, there was no crime in his slaughter of Professor Butler.

This report is now before us, in the shape of a pamphlet of one hundred and seventy-six pages. Its imposing title we have already given in full. It is supposed to be authenticated by the following certificate, which adds little, if any thing to its value, and certainly indicates that its source is suspicious. "In consequence of the general interest felt in the result of this trial, and the numerous comments that have been made upon it, it has

been thought best to give the public full assurance of the reliability of the appended report. The following certificate from well-known and disinterested gentlemen has therefore been given:—

Elizabethtown, Ky. April 26th, 1854.

This is to certify that we have heard all the testimony given in the case of the Commonwealth v. Matt. F. Ward; and on carefully examining the report of the same, made by Mr. A. D. Richardson, of Cincinnati, have no hesitation in pronouncing it full, impartial, and accurate in every particular.

ALEXANDER WALKER,

Editor of the New Orleans Delta.

THOS. D. BROWN,

Clerk of the Hardin Court.

WM ALEXANDER, of Brandenburg, Ky.,

Member of the Hardin County Bar, and formerly Prosecutor for the Hardin Circuit "

To this report then we refer to ascertain, if possible, whether the remarkable excitement produced by the acquittal of the prisoner, can be accounted for from the proceedings in the court-room; and from the evidence as there reported, we compile the following history of the case.

Previous to the first of November, 1853, Mr. and Mrs. Ward, and their son, Robert J. Ward, Jr., went to Cincinnati on a visit. Upon the first of November, William Ward, a younger son, had been punished at school, by W. H. G. Butler, the principal teacher, under the following circumstances. Matt. related that Willie, when he entered the school-room, had some nuts in his pocket, and gave some of them to several of the boys who asked for them; that he had just given all away, when Prof. Butler gave the signal for order, and the hours for study commenced; that after a short time Prof. Butler seeing the hulls on the floor inquired what boys had eaten the nuts; that one of the boys refused to tell, when Prof. B. sent into the other room for his strap, and said he would ascertain who had eaten them, and whipped the one who would not inform him; one of the boys said that Willie gave him the chestnuts after the recitation order was given; Willie said that he did not, but the boy persisted that he had; another little boy spoke up and said that Willie gave *him* chestnuts, but that it was before the signal for order had been given; that Mr. Butler before he whipped William—which he did very severely—said that he was compelled to punish him, not only for giving away the chestnuts, but also for lying, and that the boy who ate the chestnuts was not whipped at all. This statement was made by William to the prisoner late in the afternoon of the first of Novem-

ber, and it was coupled with the request — "Brother, I wish you would go round and see Mr. Butler about it; I don't care so much about the whipping, but I would rather die than that he should believe me, or the boys should call me, a liar"; Matthews concluded to go, but deferred his visit until the next day on account of the lateness of the hour at which he learned the facts.

Upon the second of November, at about nine o'clock in the morning, Matthews Ward purchased of a gunsmith in Louisville a pair of pocket pistols, the barrels of which were only two and a half inches long, but still capable of shooting "through an inch plank two feet from the muzzle," having first stipulated that they should be loaded by the gunsmith. They were accordingly loaded each with a buckshot, the largest ball that would fit them, and otherwise "fully prepared for use." From the gunsmith's shop he proceeded directly to his father's house, stopping by the way to converse about the repairs of a musical box. Upon reaching his home, he met his father and mother and his brother Robert, all of whom had just returned from Cincinnati. Matthews then related to his mother the story of William's punishment, and in his presence. It was this narration which Mrs. Ward gave in evidence at the trial, and it is the only evidence in the case as to the fact that William was punished at all or called a liar. It does not appear that Mrs. Ward thought it worth her while to examine William to discover whether there might not have been a little exaggeration as to the effects of the whipping.

After making this statement, Matthews remarked, that he would go to the school-house and "*ask an explanation and apology*" from Mr. Butler. The father offered to go, but Matthews insisted upon going himself, for the rather unsatisfactory reason that "Butler was a young man, and this had been done during the father's absence"; Mr. Butler, he added, "was a gentleman, and would do what was right *by making in the presence of the school the apology a gentleman ought to make.*" Mr. Butler had been a private teacher in Mr. Ward's family for "twenty months, and was a great favorite there. He was engaged to re-enter his position as private teacher," but protracting his visit to Europe longer than was anticipated, the engagement was annulled.

Just before Matthew started, he was cautioned by his

mother to be calm, and to remember that excitement made him sick. He replied, "I *am* perfectly calm. I know Mr. Butler is a just man, and will do what is right. I am only going to ask a civil question, and expect a civil answer." Mrs. Ward then suggested that it would be better for him to take some person with him; to which he replied that there was no necessity for it; that he expected no difficulty with Mr. Butler. Mrs. Ward then observed, that Mr. Sturgus (Butler's assistant) was his enemy. Just then Robert entered the room, and Mrs. Ward suggested that *he* should accompany Matthews. To this the latter "impatiently" agreed, telling Robert to get his hat and come with him.

From Mr. Ward's house they went directly to the school-room, without stopping by the way. While proceeding thither, Matthews told Robert that he was going round to "*ask an apology of Mr. Butler for whipping William very unjustly and severely,*" and that he did not wish either William or Robert to interfere either by word or action. To this William said, "You know, brother, that Mr. Butler is a stronger man than you are, and Mr. Sturgus has a big stick there"; to which Matthews replied, "I apprehend no difficulty. I believe Mr. Butler to be a just man, and have always found him such." He then told them not to interfere *unless both Sturgus and Butler attacked him.*

They entered the school-room at ten o'clock. What there transpired is thus narrated by Robert.

"When we reached the school-house, William went in for his books, and on being called for, Prof. Butler came out of his room with a lead pencil in his hand; we bade him good morning, and he bowed in reply—

Matt. I have called around, Mr. Butler, to have a little conversation with you.

Butler. Walk into my private room.

Matt. No: the matter about which I wish to speak with you occurred here, and this is the proper place to speak of it. Mr. Butler, what are your ideas of justice—which do you think the worse, the little boy who begs chestnuts and scatters the hulls on the floor, or my brother William, who gives them to him?

Butler (at the same time buttoning up his coat to his throat, and putting the pencil into his pocket). I will not be interrogated, Sir.

Matt. I have asked a civil question, and have a right to a civil answer,—which is the worse, the contemptible little puppy who begs chestnuts and then lies about it, or my brother William, who gave them to him?

Butler. There is no such boy here.

Matt. Then that matter is settled. I have another question to ask you. You called my brother a liar, and I must have an apology for it.

Butler. I have no apology to make.

Matt. Is your mind fully made up about that!

Butler. It is. I have no apology whatever to make.

Matt. Then you must hear my opinion of you. You are a d—d scoundrel and a coward.

Butler sprang forward, pushed my brother back against the door, and struck him; am not quite positive as to the number of blows, but I saw him strike twice; he then fired the pistol; I did not see the pistol until he fired; Mr. Sturgus then came out of his room and advanced a few steps; I was excited, and thought he had something in his hand with which he was going to attack brother; I drew my bowie-knife, and went two or three steps towards him, telling him to stand off; he then retreated; when we left the school-house, Matt. said he had forgotten the pistol, and I went back for it; the knife I wore on that occasion was one I had worn for six months constantly; at the time the pistol was fired, my brother was crushed back against the wall, in a corner, as far as he could get, and bent down; Butler then had him by the collar or cravat, and did not let go for a second, I should think, after the pistol was fired; during the conversation I was very close to the parties — within half a foot of each; when Butler pushed my brother back, it took them some four or five feet from me; I observed the whole affair very attentively."

Upon cross-examination he added :

"We all bowed to Butler when we entered; my brother's hands were then by his side; noticed that he held his hat in his left hand and gesticulated with his right after we entered; when Butler sprang forward, think it was his left hand that he seized Matt. with, and the right that he struck him with; do not feel quite positive in regard to this, as I was considerably excited; I know that he struck him twice; may have struck him three times or even four; my brother put his hat on when he told Butler he must hear his opinion of him; and when Butler seized and struck him, he then first put his hand in his pocket; did not know that my brother had pistols until I saw him take that from his pocket; have carried arms since I was fourteen years of age; having always associated with men older than myself, have done so, fearing I might get into a difficulty sometimes, and need them to defend myself."

This is the history of the origin, progress, and termination of the affair, compiled from the testimony of the father, mother, and brother, as published in that report of the trial to which Matt. Ward himself appeals. We have no hesitation in saying, after a careful consideration of all the evidence, as there published, and a full examination of the arguments in defence, and with no information as to the facts derived from any other source, that a more predetermined, deliberate and cruel assassination has seldom been submitted to judicial investigation. Such seems to be the almost universal public opinion; such must be the judgment of every person who peruses this report with an unbiassed mind. If the "code of honor" has so seared his conscience that remorse for the bloody deed which sent to a sudden and untimely grave a young, an honorable, an amiable and a useful man, which desolated a happy home,

widowed a fond, an affectionate, and a youthful wife, deprived an only child of his father, and wrung a noble brother's heart with sorrow too deep to utter, shall add no sting to his anguish, this victim of ungoverned pride must still pass the remainder of his miserable life, certain of universal condemnation as an acquitted murderer.

The trial is remarkable, not only for the atrocity of the deed for which the prisoner was indicted, the clear and distinct proof both of the homicide and of the crime, and the unwarrantable verdict of the jury. It is equally so for the number and eminence of the counsel employed on either side, the extraordinary propositions of law enunciated by the defence, the admission of testimony against all precedent and in violation of the plainest principles of law, the bold misstatement of the evidence almost entirely unchecked, either by the counsel for the prosecution or the court, the unusual and extravagant appeals to the *mercy* of the jury, and to their passions and prejudices, and more than all for the entire absence of any instructions from the court upon the principles of law, which should guide and govern the jury in their consideration of the issue.

The counsel undoubtedly understood their jury, and the selection of those who were to speak in behalf of the prisoner, was probably made with reference to the peculiar powers of each. One counsel was selected apparently to make the "stump" speech in defence, for his argument deserves no better appellation; another was probably influential because he had "often addressed them in the jury-box, and from the rostrum, on the stump, and in the muster-field," and perhaps brought to bear upon the case a large amount of local reputation for profound knowledge; another represented the bar of Louisville; while the national reputation and commanding abilities of the counsel who volunteered, could not fail to obtain from the jury respectful and sympathizing attention.

So many counsel, all speaking upon one side of a case, is rather an unusual occurrence. In this section of the country we believe it never occurred. We know, however, of no objection to be reasonably advanced against the practice, if advocates do not fear to weary the patience of those who are compelled to listen, and the court deem that the magnitude of the issue justifies so large an expenditure of public time. Still less do we consider that the reproaches cast upon the eminent gentleman who volun-

teered his services in the defence either deserved or justifiable. It seems to be thought in certain quarters that every lawyer should sit in judgment in a criminal case before undertaking to defend it; that he should follow public clamor instead of opposing it; that the more eminent and widely spread and well deserved his reputation, the more careful he should be not to lend his influence against the conviction of any one whom the public may more or less unanimously pronounce to be guilty. The proposition is so opposed to any just view of a lawyer's duty, if carried into practice, would so obstruct a due and impartial administration of justice, would so obviously convert a court of law, where every man is presumed to be innocent until he is *proved* to be guilty, into a mere field for the enforcement of Lynch law under the forms of justice, that to be condemned it need only to be stated.

It is entirely immaterial whether Gov. Crittenden volunteered or was paid for his services, except that his voluntary defence indicated the warmth and sincerity of his friendship for a man whom he had known from the time they both were boys. If a lawyer whose duty it is to take care not that his client shall be acquitted at all hazards, but that if convicted, it be in accordance with the law and evidence of the case, shall not be permitted to defend a prisoner because upon *ex parte* statements popular clamor is excited against him, we return to the barbarous practice of an unenlightened age, springing from the same ferocious spirit, when every man was deemed guilty if he chanced to be suspected, where accusation was conviction, confession forced by torture, no witnesses suffered to testify, and no counsel allowed to speak in exculpation. It is passing shameful that a lawyer like Gov. Crittenden, against whom hitherto no word of reproach has been uttered, should be pursued, insulted and persecuted for no other reason than because in the great distress and heavy affliction of an intimate personal friend, he volunteered those services, which that friend had abundant means, and doubtless ample inclination, to pay for, if required. Shame upon any one who will say that money should have purchased what friendship had no right gratuitously to bestow.

The defence rested upon the position that Butler commenced the affray by striking the first blow, and that Matthews Ward, being a weak and physically feeble person,

and either being, or having good reason to believe himself in great bodily peril, was justified in using the pistol as a necessary measure of self-defence. It was argued that Ward's errand to the school-house was altogether legal, proper, and highly to be commended. He was informed, and believed, that his brother William had been severely and unjustly whipped, and called a liar, in the presence of the whole school. As a specimen of the manner in which the severity and disgrace of the punishment were presented to the jury, we insert the following extract from Mr. Marshall's speech, the "*fun of which*," as the counsel for the Government say, is in the law he has laid down in other parts of it.

"The strap, gentlemen, you are probably aware, is an instrument of refined modern torture, ordinarily used in whipping slaves. By the old system — the cowhide — a severe punishment, cut and lacerated them so badly as to almost spoil their sale when sent to the lower markets. But this strap, I am told, is a vast improvement in the art of whipping negroes; and it is said that one of them may be punished by it within one inch of his life, and yet he will come out with no visible injury, and his skin will be as smooth and polished as a peeled onion! This is its effect on negroes; whether the same be true when it is applied to the backs of schoolboys, I know not.

Well, the strap was sent for, and another boy was called up, who was asked why he had been eating chestnuts. He replied, 'Willie Ward gave them to me.' On being asked if this was true, Willie answered, that he gave him the chestnuts, but that it was before the recitation order had been given. The other boy said that it was after the order, but Willie steadily maintained that it was not. The other boy was accredited — he was disbelieved — the breaking of a rule of the school, by the former, by eating at forbidden hours, was forgiven; but this boy, fifteen years old, was publicly whipped — not for disregarding the regulations, but on a simple question of veracity, where the probabilities were at least in his favor — flogged as a common liar, in the presence of the whole school, with an instrument with which slaves are whipped! This was the account of the matter given by the accused to his mother."

The whole of this rhodomontade has no better foundation than this single passage in Mrs. Ward's testimony, "Professor Butler sent into the other room for his strap!"

It was farther argued by all the counsel that, believing William's story to be true, the prisoner was not only authorized, but required to seek Butler, and that Butler ought to have rendered an explanation of, and an apology for, the outrage. In supporting this position one of the counsel indulged in the following strain of unanswerable argument.

"The gentlemen may talk of universal principles, but there is no principle in nature more universal, than the law that kindred blood will stand by kindred blood. Go into the forest, and even the lowest vermin in the

range of animate creation, will resent an insult offered to their kindred blood. The hen, the pheasant, and the gentle partridge, the wildest bird in our woods, will flutter around their offspring to protect them from impending danger, and punish any insult that may be given them. And I have somewhere read of an incident, in which the sluggish and stupid pelican, when she saw her nest robbed, and her young taken rudely away before her eyes, while she had no power to protect them, with her beak tore out her own bleeding heart, in agony and despair.

I ask you if there can be a higher sentiment than that, which, when the father is insulted, or the child is outraged, prompts the son or brother to resent it? Our feelings and our passions come from on high, and no human law can repeal the laws of the ALMIGHTY. As well might you command the waves of the ocean to cease their turmoil — the broad leaves to fall no more at the approach of the frost — the buds not to swell, and the flowers not to unfold in the warm breath of Spring, as to attempt, by any verdict that you can render, to blot out from the human heart this kindred sympathy and kindred love. As long as man lives, the principle will exist, and it is right that it should be so. Would you have us dead, and inanimate to every generous pulsation of the human heart — callous as marble — Ishmaelites on earth, with our hands against our brother, and every man's hand against us? It cannot be; blood will cleave to blood."

It was then contended that as Ward had demanded the explanation and apology in a gentlemanly and proper manner, and both had been refused, he had the right, upon the principle of retaliation, to take satisfaction, and still farther insult the deceased in the presence of his scholars, by using the language of a blackguard.

Mr. Marshall makes upon this point the following rhetorical display.

"We know that an explanation was refused. In mild and not offensive terms, Mr. Ward made a fair and reasonable requisition. Mr. Butler met him in no such spirit; he put on the haughty to him — refused to answer — would not be interrogated. He was asked if he had fully made up his mind; he had. 'Then, sir, as you will give no explanation, as you will not suffer the case to be fairly investigated, and the facts made known, you must hear my opinion of you. You have disregarded the courtesy of a gentleman; you have disgraced my brother; insulted my family, and refused all reparation; sir, you are a scoundrel and a coward.' Every thing had been refused — all satisfaction denied, and the prisoner, after having made a just demand, must pursue the course he did, or meanly skulk from the presence of this puissant pedagogue. And the words he used were no harsher than those which had been applied to his brother."

Governor Helm adopts the same idea, but with less dramatic effect. He says; "The only satisfaction left the prisoner, after all explanation and justice were refused, was that of hurling back precisely the same insult that had been offered to his brother, and thus making the one offset the other."

Governor Crittenden even endorses the argument by saying, "He felt his brother had been abused, insulted and

outraged, and when all other redress was superciliously denied, he *took the only satisfaction that was left him* by applying these terms to Butler."

The position is then seriously urged, that, after this provocation, Butler should have remained passive. To resent the insult by a blow was an illegal act, and his death the necessary consequence of his own wrong. Probably the counsel thought that he should have contented himself by retorting the billingsgate he received, and thus placing himself on a level with his cowardly assailant, armed with a pair of pistols and backed by a bowie-knife. But instead of pursuing this legal and peaceable course, Mr. Crittenden says "he made the first assault," and "promptly and fiercely pursued it until he had placed the prisoner in a position where he had good reason to apprehend the most serious bodily harm, in a position of extreme suffering and extreme danger;" that thereupon Ward had the legal right, in self-defence, to extricate himself by the pistol. Mr. Marshall expounds the law of self-defence in the following burst of characteristic eloquence.

"As you have heard, we are told here that this right is not derived from the law of England, but from the law of sensation — the law of nature. It is the law of all animate nature, and, upon a more enlarged and liberal view, of all nature, both animate and inanimate. In this strange and wonderful system of antagonisms, it is an all-pervading principle. Every thing in the wide bounds of nature seems to have its enemy, and is provided with the necessary and appropriate means of defence.

In animate nature this is always true. Every animal, from the noblest to the meanest, has its natural enemy, and each is provided with its own proper and peculiar weapon to fight against it. Even the serpent, the lowest in the whole range of animal life — the first tempter of our race, all cursed and blasted and blighted as he is, his head bruised and ground in the dust by the falling heel, between whom and man God has planted a bitter and undying enmity — even he, has the power of self-defence; the Almighty has not deprived him of that, but has left him his venom and his fang. And the viper, the lowly reptile you tread beneath your feet, is not unprotected; but he turns upon you, and exercises that right of self-defence with which nature has provided him.

But what does this right mean, and how far does it extend? It confers upon me the privilege of beating off any injury or infringement upon those inherent rights with which God and nature have provided me. It gives me the right to exercise any means, to use any amount of force, that may be necessary to repel such attacks. No man has a right to take my life; I may defend it and preserve it at any cost. But this is not all; a man's rights are not confined merely to the preservation of his life. He has others, many others, guaranteed by nature, that are nearer and dearer, and which it is his privilege and his duty to protect. Without these, life itself could have no charms; and had I no other right than the simple one of existence, I would raise my own wild hand and throw back my life, in the face of Heaven, as a gift unworthy of possession."

The pertinence of which illustration may be better appreciated by remembering that the use of the pistol was not justified because Ward *thought*, or had any reason to believe, his *life* in danger ; but only that he was in a situation of extreme suffering, or had reason to think so.

These doctrines are sufficiently extraordinary, and Kentucky, we suspect, is the only civilized community on earth where they could be maintained without destroying the reputation of the person who advanced them. According to the counsel for the defence, every teacher is answerable to every brother of every boy, whom he is called upon in the exercise of his discretion to punish. He is bound to explain, before his whole school, the causes which induced his conduct. If the explanation is not satisfactory to such self-constituted judge, he must apologize. If restrained from thus abasing himself in any place by a sense of self-respect, or before his pupils by the necessity of maintaining his authority, though willing to explain the case in private, he must tamely submit to the grossest imputations which "mild and amiable and gentlemanly" young men can apply to him. If, moved by the sudden impulse of a generous indignation, he raise his hand to turn the ruffian from his presence, or if, in the infirmity of human nature, he retort the insult by a blow, he may, although "a just man," and a notoriously mild, amiable, and peaceable man, and a "great favorite" with the *father* of the punished boy, be nevertheless shot to death by the bully who assails him. Such is Kentucky law, administered in what Mr. Crittenden with great felicity denominates a "*house of KENTUCKY JUSTICE!*"

Although in our estimation the act of the prisoner was an impudent and illegal interference with the duty of his father, and the demand for explanation one which Butler was not only justified in refusing, but compelled to refuse, under any circumstances, and which was especially impudent and insulting from the place and presence in which it was made, yet let the position assumed in the defence be conceded, that it was a proper and lawful interference, dictated by those irrepealable laws of kindred placed by the Almighty in every human breast.

The next position is, that when the prisoner entered the door "he was free from all malice and all criminality; that he had no criminal intention of any kind, because he had formed no deliberate intention to kill Mr. Butler." Then

the altercation took place. Butler struck the first blow, and Ward was compelled to shoot him in self-defence.

The fact that Butler struck first is not proved by the evidence, even as detailed in this *ex parte* report. Even if proved, it would fall far short of a justification of the prisoner's deed.

Thirteen of the pupils, of whom the youngest was fourteen, and the eldest twenty years of age, were examined for the prosecution, not one of whom saw Butler strike Ward; and yet the affray took place in their very midst, while they were standing or sitting in nearly a circle around him, some being as near as four feet from the parties, and others at no greater distance from them than twenty feet. One physician testified to Butler's dying declaration as follows. He "said Ward had come to see him, they had a conversation in which Ward called him a d—d liar, and struck him; that he then struck back, and was shot, but did not see who fired the pistol." Another physician gave as Butler's dying declaration — "He said Ward called him a d—d liar or scoundrel, and raised his hand; that he (Butler) then struck Ward; they clenched, and he was immediately shot." The difference between the two physicians being merely, as the counsel for the government remark, that one understood that Ward raised his hand *in* attack, the other that he raised it *and* attacked.

Against this testimony the defence produced a witness named Barlow, who testified as follows.

"Reside in Louisville; am a carpenter by trade. Have been there on and off for seventeen years; am a married man; was born in Kentucky, Harrison county; on the 2d of November, was attending to some business on Gray Street; on my way to and from it, I passed and repassed the Louisville High School; when I was on Chestnut Street, met Mr. Ransom's little boy; noticed that the boys were all out, some without their caps on, and wondered what was the cause; the little lad told me that Matt. Ward had killed Mr. Butler; I asked if he was dead yet, and he replied, No; I then saw the boys taking Prof. Butler to Col. Harney's; followed them there, but did not go in; then returned to the school-house, and while I stood there Dr. Thomson came up; I asked if he was going up to attend Prof. Butler; he replied that he was, and I went with him; we entered and found him lying on a rug in the middle of the floor, in front of the fireplace; the doctor commenced fumbling over him, and I suggested that it would be well to take off his coat; we did so; a young man there, whose name I did not know, assisted in taking off his coat; while we were doing so, I asked him, 'Who done this?' He replied — 'Matt. Ward did it.' I then asked — 'What for, sir?' He said — 'I had been correcting one of the boys for disobeying the regulations of the school, and they both came to the school-house; Matt. said he had come to seek for an explanation, and in the conversation he gave me the d—d

lie ; I struck him for it, and in the fuss he threw his right hand round against my breast and fired ; the pistol stuck in my coat, and I afterwards knocked it out.' ”

The testimony of this witness is essentially incredible. Undoubtedly the report before us places it in the most favorable light, but a very cursory examination of it serves to show that, laying no stress upon the suspicious circumstances under which other evidence in the case proves it to have been given, it is inherently unworthy of credit. The witness was completely contradicted by the prosecution in many material circumstances, and probably no witness who ever testified was more thoroughly impeached than this Mr. Barlow. It is impossible that the jury, with all their prepossessions in the prisoner's favor, could have allowed him the slightest influence.

Farther to prove that Butler struck the first blow, the defence produced Robert J. Ward, Jr., who was present during the difficulty, who had accompanied his brother expressly to keep off Sturgus, should there be any fight, who was armed with a bowie-knife, which he had habitually worn for six months, who, during the affray was proved to have “flourished it about,” and who was jointly indicted in the first count as a principal, and in the second count of the indictment, as aiding and abetting the murder.

This bold, and as it proved, successful attempt to introduce an incompetent witness, the prosecution opposed. We are not favored with the arguments of the counsel on either side of the question, nor with the opinion of the court. All that is stated upon the matter is in the following paragraphs.

“The Defence now stated that they desired to introduce as a witness, Robert J. Ward, Jr.

The Prosecution objected, on the grounds that the proposed witness was jointly indicted as a principal with the defendant in this case.

Mr. Gibson cited various authorities in defence of the position.

Mr. Crittenden replied at length, contending that the testimony would be competent, and reading from a large number of authorities, on which he based his argument.

Mr. Gibson replied, after which

The court ruled the testimony admissible, having first reviewed the arguments offered on both sides. It seemed necessary to a fair investigation of this case that the witness should be admitted, his credibility being a matter of fact for the jury to decide.”

Perhaps the counsel understood the court as well as they understood the inclination of the jury, and hence a

ruling disgraceful even to a court of "*Kentucky justice*." We do not propose to argue the incompetency of this witness. No lawyer can have a doubt upon the point. The responsibility of such gross departure from the plainest principles of law, rests between Mr. Crittenden who urged, and the judge who allowed it. This perversion of the law, and the unjustifiable use made of the testimony, thus illegally introduced, in our opinion partly accounts for, and in some degree justifies, the general indignation felt and expressed against the counsel for the prisoner.

This witness testifies for the defence under the alternative of declaring the truth to his own peril, or exonerating his brother and himself by coloring, suppressing, or falsifying the facts. We know nothing about this "precocious" young man, except from the report of his brother's trial, nor would we willingly do him the slightest injustice, though, according to his own statement, he had "carried arms since he was fourteen years of age; being always associated with men older than himself; did so, fearing that he might get into a difficulty sometimes, and need them to defend himself;" thus proving he was a young gentleman of doubtful associations. We nevertheless believe his statement, that he was not aware that his brother carried pistols to the interview with Butler. Perhaps he is entirely capable of condemning himself, should the truth require it. We regard only his attitude before the jury, and the degree of credibility to which his statements were entitled. In this view we cannot conceive that he was worthy of the slightest credence, where he was not amply confirmed. He testified under the strongest temptation which can assail the integrity of a witness. He was not only to prevent the conviction of his brother, but to save himself the disgrace of a public trial, which in any other State than one imbued with the peculiarities of "*Kentucky justice*," would have resulted in his own conviction.

Yet it was by the testimony of this witness, thus open to suspicion, and as we think not only uncorroborated, but in many material points flatly contradicted by every witness of the transaction, that Mr. Crittenden argued and earnestly insisted it to be proved that the first blow was struck by Butler. He says:

"Let us look at the testimony of Robert Ward; and after what has been shown you, I think it is not asking or saying too much to claim that

this is the only testimony which has brought order out of disorder — given the only connected and reasonable account of the whole affair, — a consistent history of the events that transpired — natural in their course, and leading directly to the results that actually occurred.”

Perhaps it is fair enough to urge, especially in a desperate case, that this witness, testifying under so strong a bias, is nevertheless the only one worthy of belief. The great reputation of counsel might possibly induce any jury at least respectfully to listen to so bold an attempt to impose on their credulity, and his great abilities invest the argument in support of it with some plausibility. But the testimony of the scholars must still be disposed of; it would be a little too audacious, for even the most unscrupulous of the prisoner's counsel, to denounce them all as perjured, especially as they were the sons of some of the most respectable citizens of Louisville. Therefore two theories are advanced to destroy the force of their evidence. Mr. Crittenden first says :

“It must be remembered they are but a set of boys, and that they are testifying in regard to a circumstance in which their teacher was killed. They must have been under the influence of excitement and fright. The time which the accused spent in the school-room was at most, not more than five or ten minutes. When he entered, they were engaged in their studies, and it was contrary to an explicit regulation of the school, to turn around and look up, when strangers came in. And when, so unexpectedly, like a flame from the earth, this fearful occurrence broke out in the stillness of that school-room, what must have been the panic of these boys? You can imagine as well as I. It would have startled men — the calmest and firmest in this jury box, or this court-room. Benedict, I think, gives a very just idea of the condition of all of them. He says: ‘I was so much frightened, that I couldn't think of any thing, or see any thing hardly.’ And whatever the gentlemen may contend, I believe this was the state of all the boys in the room. They may have seen Butler and Ward during the conversation in the early part of the interview; but this was all they saw clearly. One fact alone is sufficient to diminish the weight of their testimony. Not one of them heard all the conversation perfectly. Though one or two are confident that they did, they are contradicted by the others, who heard words and sentences which never reached their ears. No two of them give the same account of it; but on the contrary, there is much inconsistency and contradiction. It is evident that no one of them saw all the acts, or heard all the conversation that passed; and this, in addition to the general panic that agitated their minds, and confused their recollections, renders it impossible for them to give a fair and perfect history of the occurrence.

‘Ah,’ say the gentlemen, ‘but the panic was all after the firing of the pistol. Before this, up to the very moment when it took place, they can remember distinctly all that occurred.’ Is this rational? Is it according to the philosophy of the human mind? Was not the whole mind agitated and surred, so that the things both immediately preceding and immediately succeeding, were thrown into one mass of chaotic confusion? There is no other reasonable inference from the facts. Here, then, a parcel

of school-boys are brought up under these circumstances, to testify in a case of life and death—to testify in regard to a conversation partly heard and acts partly seen.”

Even this extraordinary theory it may be unobjectionable to urge upon a jury whom it would be likely to affect, although one of the “mere school-boys” (Campbell) was twenty years of age, and was cross-examined with such severity as showed how forcibly his testimony bore against the prisoner. It was fair enough thus to comment upon testimony in some respects undeniably conflicting. But we cannot conceive that any counsel of respectability was justified in advancing the second theory, by which it was attempted to account for the close coherence of their evidence upon another material and striking fact.

Almost every boy who testified, distinctly asserted, that when Ward entered the school-room he had *his right hand in his pocket*, and gesticulated with the fingers of his left. They corroborate each other in this important fact with remarkable unanimity. The only other witness of the transaction, Robert Ward, as distinctly asserted that the prisoner’s hands were by his side when he entered the room. “We all bowed to Butler when we entered; my brother’s hands were then by his side; noticed that he held his hat in his left hand, and gesticulated with his right, after we entered.”

To get rid of the testimony of the boys as to the position of the right hand, which had so strong a tendency to the establishment of express malice, the counsel argued with *no proof*, with not even a *shadow of evidence*, that Sturgus, moved by demoniac hatred towards the whole Ward family, first advised Butler to refuse the explanation, and then instilled into the minds of his pupils, by artful insinuation and cunningly contrived observations, the belief that the fact they testified to was true, he himself all the while knowing it to be false.

Mr. Wolfe says:

“There is a man by the name of Sturgus, who, though a superintendent in the school, though he was present, on the ground at the time, is not here. His testimony, it would seem, must have had some pertinence and some importance; but though he was subpoenaed to be present, he has not dared to darken these doors. I contend that he has infused ideas into the minds of these boys, during his intercourse with them, that have given an impression calculated to confuse and mislead their recollection. I contend such misrepresentations have been so often made to them, as to render it impossible, however good their intentions and unimpeachable their integrity, for them to appear before you and give a correct,

faithful history of the occurrence. And this man Sturgus—he who gives so exalted an idea of his courage by stating that when he saw his friend killed he made his way out of the nearest window—who, when he reached Dr. Caspari's office, instead of asking them to send for a physician, might far more appropriately have said,

‘I am the rider of the wind,
The stirrer of the storm,
The hurricane I left behind,
Is yet with lightning warm;’

for if he had not kept in advance of the lightning on his flight, it was only because nature neglected to provide him with the ability to do so—this man, I must believe, has instilled into the minds of the school-boys ideas not consonant to their calm judgment, and their unaided recollection.”

Mr. Crittenden repeats this slander.

“These boys, from eleven to eighteen years of age, since the occurrence of the principal fact we are investigating, have been the scholars, and under the tuition and training of Mr. Sturgus. With all their natural sympathies on the side of their teacher—with all these other circumstances tending to give their minds a bias, they have been from that day to this under the authority and instruction of Sturgus, the enemy of Mr. Ward—the pursuer of this prisoner. You, who understand the affairs of men, will see the impossibility of a fair and faithful narration of the event from them, under such circumstances. You well understand how this man—they not knowing it—by a word properly thrown in, or a statement repeated until they were familiar with it and received it without question, may have exercised great influence and control over the feelings and recollection of these boys. He is their teacher and guardian—they are under his charge, and though he was sworn here as a witness for the Commonwealth, he was not introduced upon the stand. Put all these facts together—and it is your business where the facts are not all known, but a few of potent character are established, to infer the others—weigh them carefully in your own minds; and then judge for yourselves if the probabilities in regard to the character of the testimony of these boys are not all in favor of the assumption I have made.”

And again.

“Sturgus, as you have heard, had administered a whipping to the boy on a former occasion, the facts of which we desired to introduce here, but we were not allowed to do so. Is it not probable that, instigated by his enmity towards the Wards, when he heard of this punishment, he advised Butler to refuse all explanation and investigation? The circumstances of the case—the position of Butler and Ward—their friendly relations—the just and reasonable demand that was made—all show the refusal to have been inconsistent with his character and his heart. Is it not a rational inference, then, that he may have been prompted by the sinister, subterranean motives of another man, who desired to minister to his own anger and ill-feeling? I think it was not like Butler, when he was asked such a question, by a man he knew so well, and esteemed so highly, to button up his coat and answer haughtily: ‘I am not to be interrogated, sir.’ But it was like Sturgus.”

The only foundation for these atrocious attacks upon Sturgus is found in the statements of Mrs. Ward, and of William Ward, which were made just previous to the

prisoner's visit to the school-room. Sturgus was not called either by the prosecution or the defence, but why, is nowhere apparent. All we know of him is in his favor. He was Mr. Butler's assistant, and the admitted high character of Mr. Butler forbids the supposition that he would suffer an improper person to occupy that responsible situation. Yet Robert J. Ward, Jr. must be sustained in statements as intrinsically improbable as any that were made in contradiction of him, which were made under great temptation to suppression and concealment, by the wholly unsupported assumption that Sturgus was such a mean, malignant, vindictive wretch, so vile and blood-thirsty an enemy to the whole Ward family, that for the purpose of cowardly revenge he would infuse falsehoods into the minds of his pupils, and through their testimony revel in the disgrace of the family by producing the conviction of the prisoner.

We will not quarrel with counsel for assuming untenable positions in a desperate case. Self-defence, upon the facts proved in this trial, was as fair a ground to stand upon as insanity or somnambulism were in cases occurring in this locality. If counsel could impose upon the intelligence of a jury by trash of that sort, it was perhaps the prisoner's good luck. The responsibility of an acquittal lies between the court and the jury. Advocates whose skill as criminal lawyers consists in bullying witnesses, insulting opponents and pouring forth extravagant rhodomontade, well suited to the bar-room, the muster-field or the stump, but utterly inappropriate to the solemnity of a court-room, it may not be unreasonable to expect will pervert the law and misstate the facts, and after all, before an honest and intelligent jury, will rather injure than benefit their client's cause. But when a lawyer, whose name alone is a tower of strength, whose reputation is great alike at the bar and in the senate, whose statements are supposed to be stamped with truth, and whose opinions have the weight of authority, when he perverts the law and misstates the facts, and by the force of his great name and brilliant powers urges the acquittal of a felon in the face of evidence, upon assertions unproved and unsupported; not all his past services, nor his future expectations, however great the one or well-founded the other, can avert that just indignation of the public which the perversion of great powers to an unworthy purpose is sure to excite.

The attack upon Sturgus was utterly indefensible upon any code of ethics known beyond a grog-shop. It is disgraceful to the counsel who made it, to the court who permitted it to pass unchecked, to the jury who allowed it to influence their decision. It was unnecessary and uncalled for. A mere slander upon a respectable and an unoffending man. Desperate indeed must have been the cause which required, and reckless the counsel who adopted, such a theory. A course thus repulsive to the natural sense of justice, so derogatory to the dignity of the bar might have been expected from counsel who carry to the courthouse the customs of the camp, the muster-field or the stump, who view the law as a trade, and the halls of justice as a bazaar for the exhibition of their wares; who cannot appreciate the responsibilities of counsel as the advocates of truth—but the national character, the extensive reputation, the commanding influence, the undoubted genius of Mr. Crittenden, should have led him to reject with contempt this artifice of a pettifogging attorney.

We think that no candid inquirer will be convinced, either by the evidence or the comments upon it, that the fact is at all proved that Mr. Butler struck the first blow. But let this fact be also conceded. Let charity cover, as a delusion, the extreme credulity, let it excuse, as a pardonable weakness, the tender conscience which induced the jury to receive as proved this questionable fact. They who are not under oath, who are not sitting in solemn practical judgment, who have not in their keeping the life of a prisoner, may require less proof for conviction, and be apt to judge erroneously, and to condemn harshly those who differ from them. They see not the witnesses; however faithful the report, they hear not all the testimony; they cannot, like a jury, decide upon the truth or falsity of evidence by that instinct inherent in every honest heart, which renders a jury, where the witness is confronted with the prisoner, and testifies almost as much by his look, his manner and his character, as by his detail of the facts, so valuable in determining the truth. Let therefore the fact be admitted, that the unhappy Butler did in truth strike the first blow, how will the defence stand upon that admission?

It is apparent from the evidence, from its general tendency and character, that when Matt. Ward, on the evening of November 1st, determined to visit Mr. Butler's

school-room, he anticipated *some* difficulty, some personal collision, as highly probable, if not altogether certain, to arise from the interview. Such was his mother's apprehension *before* he started, and it was her importunity which induced him to take his brother Robert. Such was William's belief, and it was his suggestion which induced him to make the pregnant concession, that if *both Butler and Sturgus* attacked him, Robert might interfere. If *one only* attacked him, Robert was to stand off. This "*wan, weak, rheumatic* invalid," considered himself as a match for either one of these powerful opponents, by reason of his concealed weapons. He doubted his ability to murder both.

It was in expectation, not perhaps of the demonstrative certainty, but of the exceeding probability of a collision, that one hour before his visit he purchased this pair of loaded pistols.

This point is virtually conceded by Gov. Helm, who says:

"He had not been insulted; he merely wished to set his little brother right. You will remember that, before he left the house, his mother insisted on Robert going with him, reminding him, as a reason, of the enmity of Sturgus. He was aware of that enmity before; and it may be that he had thought of it, and reasoned with himself thus: 'I am going to perform a sacred social duty, which I owe my brother; he has been whipped, and denounced as a liar; and, in the presence of the school — in the presence of those very witnesses who saw his disgrace — I am going to have the matter investigated and explained, and to learn whether he was really wronged. But I am weak, feeble, utterly unable to defend myself in case of any difficulty. I know there is a man there who is my enemy; the sympathies of his pupils must be with him, also, and as, *per possibility*, in the performance of this duty some difficulty may ensue with him, I will take this little thing along to frighten the boys and keep off Sturgus.'"

And by Mr. Crittenden, who says,

"But he had been told, and he knew before, that Sturgus was his enemy. He knew that by some remote possibility the visit might lead to a collision and combat with him. He was very weak — utterly unable to resist any attack that might be made upon him; and therefore it was right for him to arm himself."

Some difficulty, a personal collision, *either* with Butler or Sturgus, was anticipated by Matt. Ward as possible, and he armed himself accordingly. With which of these two then did he expect it possible that the collision might occur? He went, say the defence, upon a lawful errand, to ask in a gentlemanly way an explanation and apology, which he had a right to require, of a person whom he ad-

mitted beforehand to be a just man and a gentleman, and who was extensively known to be mild and amiable, but at the same time high-spirited and courageous. The assertion that he expected, as a possible contingency, an attack from Sturgus, is one of the many extraordinary assumptions of the defence that should not have imposed for a moment upon any intelligent jury. If Matt. Ward went upon this peaceable errand to Mr. Butler, with no ulterior purpose, upon what ground could he have had the remotest belief of an attack from Sturgus? Admitting that Sturgus *was* his enemy, of which there is not the shadow, we will not say of proof, but of evidence, in any part of the case, it is essentially incredible that he could have believed, even as remotely possible, an assistant teacher, employed by a person of Mr. Butler's character to teach some forty boys, belonging to the first families in Louisville, was so vindictive an enemy, had such ungovernable temper, and was moreover so deficient in common understanding, as without provocation to assail a visitor to *his principal*, and to assail him so violently as to render fire-arms necessary for his protection — and that his mere presence in the school-room, or the mild and gentlemanly conversation which he purposed to have with Butler, would of themselves draw upon him an attack from Sturgus, with whom he did not intend to exchange a word. This, with incautious inconsistency, is admitted by Mr. Crittenden, who says, —

“On the way, Matt. tells him — it was not all detailed here, but this was evidently the burden of the conversation: ‘I am going to seek explanation and apology for an injury done to brother Willie. I did not want you with me; you are young and hasty; you do not know the circumstances of the case, and you might act indiscreetly. I apprehend no difficulty — Butler is a gentleman, and will do what is right; and I desire you not to have a word to say.’ It was as much as to say, ‘I would you were at home, Robert, but now you are here do not interfere by word or deed.’ But little Willie, who has heard this injunction, says: ‘Ah, brother, but Mr. Sturgus is there!’ — not Butler, but Sturgus — ‘and you know he has a big stick!’ Matt. replies: ‘Why, I shall have nothing to do with Sturgus — my application is to Butler.’ Then he turns to Robert, and adds: ‘If, however, Sturgus and Butler both attack me, you may interfere.’ He conjectured the possibility of this only to soothe the feelings of the little boy. He had already made Robert passive; but listening to the suggestion, must excite his anxious and brotherly apprehension; therefore he said: ‘If such a thing does occur, which I do not expect, you *may* keep off Sturgus.’”

There was therefore a possible contingency which he foresaw and provided against. This is apparent from the

testimony, and is admitted by his counsel. Let any candid reader of the evidence and the arguments, say whether this contingency related to Sturgus. It had *no* reference to him. Ward went prepared to resist a possible attack from Butler, and the question remains to be answered, Why did he anticipate as possible an attack from Butler?

By every counsel it was strenuously urged that the prisoner's errand was lawful, and his demand for explanation and apology one with which Butler ought to have complied. By every counsel it was urged, that the insult which he offered to Butler when compliance with the demand was refused, was a proper satisfaction, and the only satisfaction left for him to take. The *refusal* of Butler to accede to this demand, was the *contingency* on the happening of which the collision was expected. *Why?* Because Ward must either "*pursue the course he did, or meanly skulk from the presence of this puissant pedagogue!*" This course he made up his mind to take in the contingency of the refusal. If Butler failed to apologize, he predetermined to insult him, as the only *gentlemanly* satisfaction left; and as the counsel for the prosecution say "the use of such language in our good old commonwealth operates like a trumpet-call to battle, every man who utters it knows he will be struck." Ward knew well enough what would follow his insult — he is possessed of much less intelligence than was claimed for him on the trial — he had much less respect for Butler than his uniform assertions indicated — he had little belief in Kentucky chivalry — if he was not certain that the gross, deliberate, aggravated insult which he offered to Butler, would produce from him a demonstration of some kind. It was less the evidence, than the instinct of a Kentucky jury, which settled the fact. Campbell knew it; he felt as if he should fight. Sturgus is ridiculed by every counsel in defence, because he *did not* fight, but, scared by a brace of armed bullies, jumped out of the window instead of assisting his employer. Butler is commended as "a man of courage, who would not receive such language without giving a blow in return." Had he not resented the insult on the spot, Kentucky chivalry would have forced him from the State. Ward knew that he would be struck when he uttered the insult. He predetermined to utter it if the apology were not given, and he foresaw and provided against the contingency of its denial. Therefore the provocation to the

quarrel was given by the prisoner. It was of his own seeking, and he intended the result which naturally followed the means he voluntarily used.

Mr. Allen, in his closing argument, states the correct law upon the point: — "A man must be without fault before he may kill an assailant: there can be no extenuation of his offence, if the provocation were of his own seeking." Nor can we perceive any substantial distinction in principle between this case and those usually cited from Russell on Crimes, where A. and B. having fallen out, A. said he would not strike, but would give B. a pot of ale to strike him, upon which B. did strike, and A. killed him, it was held to be murder. So where A. and B. were at some difference, A. bade B. take a pin out of his (A.'s) sleeve, intending to take the occasion to strike or wound B.: B. accordingly took out the pin, and A. struck him and killed him, it was held to be murder.

Upon this point the defence contended that the killing was without malice, and in support of this proposition advanced some curious principles of law, probably to be found in no code except in that "glorious unwritten Kentucky law, which has never been contaminated by coming in contact with printer's ink."

It was first contended that there was no express malice. No accurate definition of this legal phrase was given by the counsel, who seemed purposely to confound together malice and hatred, contending that because Ward had not predetermined the death of Butler at all hazards, and did not visit the school-house "with a deliberate intention to shed the blood of a man whom he *respected and loved*," there was no legal malice proved.

But it was on the question of implied malice that the law received those new illustrations which must forever render the trial memorable in the history of jurisprudence. The hard fact in the case was the purchase of loaded pocket pistols, just one hour before their fatal use. That point required delicate and decisive handling, and the counsel seem to have exhausted upon it all their ingenuity and skill.

To repel the implication of malice which almost irresistibly arises from the fact of the purchase and its accompanying circumstances, it was proposed to prove that it was the general custom in Louisville to carry arms. Such evidence was objected to, but was admitted.

"Mr. Wolfe. Will you tell the jury whether it is the ordinary custom in Louisville to carry arms?

Mr. Carpenter objected to the question.

Gov. Helm remarked that they desired to prove the custom with a view to rebut and repel any presumption of malice on the part of the defendant.

Mr. Carpenter considered the issue an outside one, and thought that if it could be shown that every man in Louisville was in the habit of bearing arms, it could be no mitigation of the circumstances in this case as already proved. A custom could not justify a breach of law.

The Court remarked that the Commonwealth had shown defendant to have procured pistols on that day; the question now at issue was, whether this killing was done in self-defence, in the heat of passion, or maliciously. Any facts tending to show the motives of the accused were legitimate, and the question was therefore permitted."

The answers of the witnesses did not much assist the prisoner. Mr. Prentice, an intimate friend of the family, replies:

"My own impression is, that the proportion of those citizens who bear arms habitually, is small. Nevertheless, I believe almost every young man, if he is expecting an interview which is unpleasant and may result in a collision, especially with a person of superior strength, arms himself. Have known numerous instances in which it has been done — not with a view to commit violence, but to prevent himself from being disgraced."

Major Alexander cannot go much farther. He says:

"Call Louisville my home; as far as my personal knowledge goes, have often known arms borne on the person there; do not know that it is always done, but know it is usually the case when a difficulty is anticipated; have done it myself; as far as I have known of persons wearing arms, it has universally been done for the purposes of defence, not assault."

After this signal failure to establish a custom, it was attempted to prove the prisoner's special habit of purchasing pistols, and having them loaded at the shop! This was a little too bold, and the question was disallowed. Then it was proved that he had been for several days preparing to visit his plantation in Arkansas, and thence it was argued that he purchased them for protection on his journey.

Still the facts pressed heavily upon him. He bought the pistols an hour before he used them, had them loaded when he bought them, went almost immediately to the school-room, entered into the conflict *secretly* armed, provoking upon himself an attack from a *man of courage*, whom he *loved and respected*, but who in physical powers was far his superior. Upon these facts the law is clear, as stated by Mr. Allen.

"I contend that this act was murder — not manslaughter — because it is the presumption of the law that it was done with malice. (Archbold,

124, 316). That presumption is sustained by the fact that the defendant entered into the conflict armed. (Wharton, 369, 374). The antecedent preparations indicate the existence of malice (lb. 276): and when this is once established, the malice is presumed to exist, during the whole time occupied by the transaction (lb. 360, 361). The facts that the pistols were procured; that they were taken to the school-house and used immediately after, are plain indications of a malicious heart. No sudden passion — no heat of blood seems to have existed, which is necessary to reduce the offence to manslaughter (lb. 368); but all the circumstances show cool and calculating deliberation."

This cogent argument was anticipated by the defence, perhaps the opening counsel for the prosecution may have urged it more powerfully. But how the defence writhed and twisted under the almost conclusive inference of malice arising from the facts, may be seen from the following answers to it.

"The difference between malice express and implied, and the circumstances under which it may be implied, are pointed out in Russell, p. 482. It may be either expressed or implied from certain reasons, but this implication is merely an inference — only a presumption, and if I am able to meet it with facts that combat and destroy that presumption, of course it can have no effect.

With a view to fasten upon your minds the distinctions between murder, manslaughter, and justifiable homicide, I will read you a few cases. (The principal cases cited by Gov. Helm on these points, were from Wharton, pp. 224, 234, 235; and Russell, 513, 514, 515.)

It must be remembered that we have no written law in Kentucky relating to these points, and that the authorities from which I have been reading are English authorities. Many of these old books, being compiled from various sources, collecting here one maxim of law and there another, contain many inconsistencies and contradictions; and moreover, their tenor is much more stringent than the decisions which usually are and always have been made in the United States."

But the clincher is the following:

"They will read you authorities to show that, because a pistol is a deadly weapon, the law will presume malice in this case. Now I will repel that assertion by this fact. *In the store where the prisoner procured it, there was a great variety of instruments, of all kinds. But he chose the least weapon in the whole establishment — one that, in nine cases out of ten, would not produce death. The law that the gentlemen will read you, refers to the old English pistol, — not to mere pop-guns such as this.* The weapon has been produced here, and you can judge for yourselves of its deadliness. The circumstances under which it was used — the contiguity of the parties at the time — remember, were brought on by the deceased himself, and not by the prisoner at the bar; he could not avoid it.

Now, if he intended to produce death, why did he not procure a weapon that was sure to do so? If it were vengeance and death only that he sought, he knew of the event the night previous, and why did he not go, under the cover of darkness, at that still hour, call out Professor Butler and take his life, when he might have had an opportunity to make good his escape?

But admitting, for the sake of argument, the proposition of the State, that he procured the pistol to be used on that occasion, even then, I combat

the presumption of malice. I ask you again, is it probable that a man of honor and a gentleman, would go with a deliberate intention to shed the blood of a man he respected and loved?"

We apprehend that such stuff as this, was never uttered by respectable counsel as law in any other than "a house of *Kentucky justice*." It is a little worse than the argument of another Kentucky lawyer, that a prisoner could not be convicted of manslaughter because it was proved he killed a woman.

The final answer to the whole argument rested upon the natural and inherent right of every man to bear arms in *self-defence*. It must therefore be presumed that the prisoner purchased the pistols in the exercise of that general right.

"My object is to show that when a man arms himself with a general purpose, there is no rule of law by which it can be converted into a special one; that if he does obtain weapons, and uses them lawfully afterwards, the procuring of them was no crime. If Mr. Ward procured pistols before the conflict, and during the conflict unfortunately slew Mr. Butler — I say unfortunately, not that I deem the act a guilty one, but because the loss of human life, under any circumstances, must cause a pang of regret to the hearts that are left behind — if during the catastrophe, he acted only according to law, the fact of his procuring the pistols cannot make an act unlawful which was otherwise justifiable and proper."

Having thus lawfully purchased those pistols, in the exercise of an inalienable right, he used them in self-defence, and thus was justified, and perhaps even praiseworthy, in killing Mr. Butler.

We have said enough, we think, to demonstrate that self-defence was a mere pretence, the sole hope of a desperate case. But we cannot leave this topic without alluding to the still more extraordinary doctrines set forth by the counsel, and urged and enforced without correction by the court. As an example:

"But they contend that if you have been in fault at all, when you are attacked you must not avail yourself of the right of self-defence, which is guaranteed to every man alike by the laws of nature and of human society. Does this seem reasonable? Suppose a man assails you in your absence, or defames the character of your wife or daughter. You seek him, or inadvertently meet him, and denounce him as a scoundrel and a villain. If he attack you then, have you no right to defend yourself, and resent the insult? Is this law, in Kentucky, and in this Union? I deny it."

This newly discovered principle is the great American doctrine of self-defence, which is thus commended by the same counsel:

"In the case of Granger in Tennessee, this principle was also estab-

lished, and it is one that must appeal to reason and humanity. The cruelty with which the law was administered in former times, shows that the world was in a degraded condition, and that human rights were not properly appreciated. There was a time, when there was no less than one hundred and forty offences punishable with death. In those days, if a man broke down a mound in a graveyard, or disturbed a fish-pond, it must cost him his life. *But now, those rigid rules have been ameliorated by a more genial and civilized code, which goes a bowshot further than these musty old English books, and places a higher value on human life; it is the American doctrine of self-defence."*

The precedents in support of this great doctrine, probably originated in Kentucky, — at least the citations are nearly all from cases occurring there, — the most remarkable of which are the following :

"The gentlemen have alluded to cases not recorded in the books, and as they have furnished the precedent, I will relate a few. Near Boston, in this State, Stout was tried for the murder of Bullock. During a political campaign, the former, who was a democrat, set up a flag, which Bullock pulled down. Stout would have shot him at the time, but his friends held his arm. Bullock went to a grocery, where he spent the day; and when he was returning home at night, he stopped at the house of Stout and called for whiskey. Stout refused to give him any, and ordered him to leave the house; he would not obey, and Stout took his gun and shot him. He believed from the previous conduct of Bullock, that he had come there to do him bodily harm; he was weak and small, Bullock was a large, strong man, and therefore the homicide was held to be justifiable.

In the Jefferson circuit, a few years ago, Coon was tried for the murder of Shaeffer. The latter had insulted Coon's wife, and Coon went to obtain redress. He told Shaeffer of the insult, whereupon he raised his arm, as Coon thought to strike him, though it afterwards appeared that his hand only contained a small piece of wood. Coon then plunged a file into him, and it immediately proved fatal, yet the jury sustained his conduct.

The case of Owen, charged with the murder of Haire, caused so much excitement in Louisville, a few years ago, that it was necessary to obtain a change of venue to secure a fair trial. The parties slept in the same bed; in the morning Haire missed some money, and accused Owen of taking it. Owen asked an explanation; it was refused, and he prepared himself with a pistol before they met again. Haire, I believe, also had a pistol, but Owen shot him, and was acquitted on the ground that he had a right to obtain redress for the injury done his character."

It is not surprising that these cases cannot be found recorded in any book; we trust that for the honor even of "*Kentucky justice*," Mr. Wolfe was mistaken in his recollection of the facts. They must have occurred during the time when books of any kind were scarce, and that State was earning her name of the "dark and bloody ground."

The only reported case cited in support of the *American doctrine of self-defence*, was that of the *State of Tennessee v. Granger*, in Yerger's Reports, where "the principle

was established that when in case of conflict, a man believes, and has ground to believe, that he is in danger of great bodily harm, he is justified in killing, whether he really was in such danger or not. His right to defend himself cannot be abridged, and if he has good reason to apprehend great danger, from the facts by which he is surrounded, the homicide is justifiable."

Concerning which Mr. Allen says:

"I have been assured that the decision in the case, in Tennessee, of *The Commonwealth v. Granger*, has been overruled in that State, by the Superior Court; and I maintain that you may look through all the law books, without finding a single parallel for it."

Upon the authority of this case it was contended that Ward was placed, by Butler's assault upon him, in such a position, as to have good reason to apprehend, not a mutilation or loss of life, but great bodily suffering, and therefore had a right to shoot him; or, as Mr. Marshall says, "to cut his throat from ear to ear." The facts do not justify the assumption, as Mr. Allen argues in reply.

"There was nothing of the kind; Ward knew that Butler neither intended to take his life, nor to do him great bodily harm. The most violent intentions he could possibly entertain, were to inflict chastisement. There had been no menaces against his life; Robert was close at hand, ready to assist him the moment he was called upon; no weapons had been drawn upon him; and this defendant had no right to anticipate the danger which by law justifies homicide; *he never did anticipate any such danger*. A man must retreat to some obstacle which he cannot pass (Wharton, 386); here, the door was open, and near by, and there was nothing to prevent egress through it. Gentlemen, is this killing in self-defence!"

There can be but one answer to this question, upon any known principles of law as practised out of Kentucky. It was deliberate murder, for which the prisoner should have been convicted.

We have left but little space to speculate upon the causes which produced this disastrous acquittal. Disastrous in every point of view; especially disastrous and disgraceful to the State within whose borders justice was thus mocked, despised and trampled upon. It will go far to confirm the principle which "is fearfully gaining ground among the young men in Kentucky. It is a doctrine that has caused more widows and orphans in the land than any other, — a doctrine which, if you look at a man in a way he does not like, authorizes him to shoot you down; if you speak to a lady acquaintance in a manner he deems too familiar, or if you inadvertently tread upon his toe in the theatre, com-

pels you to make the most abject apology, or to atone for the act with your blood.

It is called the Code of Honor; and the worst feature of this bloody code is, that it constitutes every man the judge and avenger of his own wrongs. It was this principle that actuated the accused — this motive that caused the awful deed. It was this that induced him when, as he thought, a member of his family had been insulted, to go and disgrace the teacher, or take his own redress."

We ascribe the result of the trial to two principal causes independent both of the ability of the counsel for the defence, and of their gross misrepresentation and exaggeration of the facts.

The first cause we notice is, the exceeding injudiciousness of the prosecuting counsel. We have room to make only one extract from the address of apparently the ablest of the four who is called the great "*Ajax Telamon*" of the prosecution, and of whose ability and reputation there seemed to be among the counsel for the defence considerable apprehension. The extract, however, is taken from Mr. Marshall's speech, and may be indebted to his imagination for something of its absurdity:

"Attention has been directed to the past life of the accused, and this travelled young gentleman is graciously informed that he may commence his travels over again. But the permission is coupled with the assurance that wherever he may go — whether he shall climb the rugged Alps and wander in the regions of Polar cold, or roam through the sunny climes of Italy and France, still every opening flower shall remind him of the flowers he has left blighted at home. Should he seek the blue ocean, we are told that each white cap will remind him of the shroud of his victim, and that in the boom of every surge, he shall hear the rattle of the death-shot."

But the following, from another of the prosecuting counsel, is so savagely ferocious, that we can hardly believe that it was not overcolored in the repetition:

"He has told you that were the training of the child of Professor Butler confided to his hands, the first word he would teach him, should be vengeance, and the second, blood. That he would instil into his infant mind no other feeling so deeply as that of revenge, and would train him up to make it the great business of his life to follow, like a bloodhound, the track of the accused, and never to rest until he had found him and shed his blood!"

Shocking, indeed, as Mr. Wolfe says, "alike to every principle of religion and every sentiment of humanity."

An injudicious prosecution is not unfrequently as fortunate for the prisoner as an able defence. If the character

of the arguments for the government is at all indicated by the preceding quotations, and others of a like description which might be made, the jury would naturally become suspicious of the strength of a cause which demanded such eloquence to support it. They would feel compelled to view the prisoner more leniently than his crime required; and would, especially if not very intelligent, experience out of mere pity, a reaction in his favor. The defence took great advantage of this sophomorical declamation, and forcibly urged upon the jury the opposite considerations of kindness and mercy.

The second cause of this acquittal appears to be, the entire doubt in which the jury were left as to the principles of law applicable to the facts. The most contradictory assertions were made by the counsel. Nearly every proposition maintained by the defence was combatted, and we think refuted, by the closing counsel for the government, his being the only argument printed in the pamphlet before us. The jury were told, and rightly so, that reasonable doubts should enure for the benefit of the prisoner. Here four counsel on one side stated such propositions of law as were never before enunciated in a courtroom. These were denied by the government, and the true doctrine expounded with no great force of illustration, but still with general distinctness. Left in this position, the jury must rely upon the court to dissipate the fog or acquit the prisoner, because they doubted on the law. We at first supposed it to be a peculiarity of "*Kentucky justice*" that the judge should not interfere, but it is not so. Mr. Allen informs the jury that they are to try the case, "and to form their verdict according to the written law of their country, *expounded by this Court*, and applied to the testimony by their own understanding." And again, "If I have misstated the law on any point, I am sure his Honor will correct it in his charge."

We have recently seen the excellent Chief Justice of our own Supreme Court — excellent as a man, pre-eminent as a lawyer and a judge — occupy more than two hours in charging the jury in a capital cause, where the prisoner was merely a State Prison convict. Such is his habitual practice in every case of the kind, founded as much on his anxious desire for impartial justice, as upon the sense of obligation arising from his station; let the jury understand the law, whatever may be their verdict on

the facts. But in this great Kentucky cause the presiding judge made no charge, worthy of the name, and did nothing to remove the mystification into which the minds of the jury were inextricably thrown.

Of what constituted malice the jury were completely ignorant, the only observation made by the court being :

“ Malice, express or implied, is an essential ingredient of this crime ; there can be no murder without it. Malice has been defined and explained to you, and numerous cases have been read, where a certain state of facts have been determined by courts of justice, to indicate that acts were malicious or otherwise. These judicial decisions are properly to be regarded as illustrations of the legal idea of malice. In some of them the distinction between the two classes of cases is almost imperceptible ; and in understanding those cases properly, you will have to bear in mind the definition of malice, so as to make a just application of the principles of the law to the present case.”

But malice was defined and explained to them in two such opposite ways, that they were probably less wise on the point after than before the explanation. These two causes would be sufficient to account for the acquittal, without impeaching the integrity or intelligence of the jury, were it not that the instinct of the human heart, in a case depending upon no nice distinctions—where the important facts were indisputably proved, could not fail to see in this atrocious transaction nothing but a murder.

We have endeavored to consider this trial merely in a professional way. Many points have been omitted, which might be appropriately noticed,—but to criticize it as fully as it is capable of criticism, would much more than double the length of this article. It presents not only strange points of law, but exhibits a tone of thought, a style of professional conduct, and a social idiosyncrasy, fortunately altogether unknown in New England. No Massachusetts man can peruse the report without contrasting “*Kentucky justice*” with that of his own more favored State. He will find in this trial—in the declamations, the expositions, the conduct of the counsel, in the rulings of the court, and the verdict of the jury, and in the doctrines of the “code of honor,” which taint the entire proceedings, renewed cause for rejoicing, that his lot is cast in a community where the law is not only ably discussed and wisely expounded, but above all is sure to be impartially administered.

Recent American Decisions.

*Supreme Judicial Court of Massachusetts, Middlesex,
February, 1854.*

COMMONWEALTH v. JOHN L. CHAPMAN.

*Indictment — Murder — Averment of Assault — Description of Wound —
Principal.*

In Massachusetts, in an indictment for murder, it is not necessary to aver that the assault was made wilfully, and with malice aforethought.

In an indictment for murder, which alleges that the defendant "did strike and bruise, giving to the said A. B., then and there, with the axe aforesaid, in and upon the said back side of the head of him the said A. B., one mortal wound," it is not necessary to describe either the length, breadth, or depth of such wound.

Evidence that a party is present, aiding and abetting in a murder, will support an indictment charging him with having committed the act with his own hand.

THIS was an indictment for murder, tried at an adjourned term of the Supreme Judicial Court of Massachusetts, held at Cambridge, in the County of Middlesex, commencing February 21st, A. D. 1854.¹ The defendant was indicted for the murder of Reuben Cozzens, at Sherburne, in said county, on the fourteenth day of September, 1853. The indictment, which contained three counts, was as follows:—

"The Jurors for the Commonwealth of Massachusetts, on their oath present, that John L. Chapman, late resident of Sherburne, in the county of Middlesex aforesaid, laborer, on the fourteenth day of September, in the year of our Lord one thousand eight hundred and fifty-three, at Sherburne aforesaid, with force and arms, in and upon one Reuben Cozzens, in the peace of the Commonwealth then and there being, did make an assault, and that the said John L. Chapman, with a certain axe, of the value of fifty cents, which he, the said John L. Chapman, in both his hands then and there had and held, the said Reuben Cozzens, in and upon the back side of the head of him the said Reuben Cozzens, then and there feloniously, wilfully, and of his malice aforethought, did strike and bruise, giving to the said Reuben Cozzens, then and there, with the

¹ Before SHAW, C. J., and METCALF and MERRICK, JJ.

axe aforesaid, in and upon the said back side of the head of him the said Reuben Cozzens, one mortal wound, of which said mortal wound the said Reuben Cozzens then and there instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said John L. Chapman, the said Reuben Cozzens, then and there, in manner and form aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder; against the peace of said Commonwealth, and the form of the statute in such case made and provided.

"And the jurors aforesaid, upon their oath aforesaid, do further present, that John L. Chapman, late resident of Sherburne, in the county of Middlesex aforesaid, laborer, on the fourteenth day of September, in the year of our Lord one thousand eight hundred and fifty-three, at Sherburne aforesaid, with force and arms, in and upon one Reuben Cozzens, in the peace of the Commonwealth then and there being, did make an assault, and that the said John L. Chapman, with a certain axe, of the value of fifty cents, which he the said John L. Chapman in both his hands then and there had and held, the said Reuben Cozzens, in and upon the back side of the neck of him the said Reuben Cozzens, then and there feloniously, wilfully, and of his malice aforethought, did strike and bruise, giving to the said Reuben Cozzens, then and there, with the axe aforesaid, in and upon the back side of the neck of him the said Reuben Cozzens, one mortal wound, of which said mortal wound the said Reuben Cozzens then and there instantly died. And so the jurors aforesaid do, upon their oath aforesaid, say, that the said John L. Chapman, the said Reuben Cozzens then and there, in manner and form aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder; against the peace of said Commonwealth, and the form of the statute in such case made and provided.

"And the jurors aforesaid, upon their oath aforesaid, do further present, that John L. Chapman, late resident of Sherburne, in the county of Middlesex aforesaid, laborer, on the fourteenth day of September, in the year of our Lord one thousand eight hundred and fifty-three, at Sherburne aforesaid, with force and arms, in and upon one Reuben Cozzens, in the peace of the Commonwealth then and there being, did make an assault, and that the said John L. Chapman, with a certain axe, of the value of fifty cents, which

he the said John L. Chapman in both his hands then and there had and held, the said Reuben Cozzens in and upon the back side of the head of him the said Reuben Cozzens, then and there feloniously, wilfully, and of his malice aforethought, did strike and bruise, giving to the said Reuben Cozzens, then and there, with the axe aforesaid, in and upon the said back side of the head of him the said Reuben Cozzens, divers mortal wounds, of which said divers mortal wounds the said Reuben Cozzens then and there instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said John L. Chapman, the said Reuben Cozzens then and there, in manner and form aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder; against the peace of said Commonwealth, and the form of the statute in such case made and provided."

Before the jury were empanelled, the prisoner's counsel moved the court to allow the prisoner, who had, in the absence of his counsel, pleaded not guilty to the indictment, to retract his plea, and to demur, and cited *Regina v. Purchase*, Car. & Marshman, 617; Archbold, Crim. Pl. (London ed. 1853,) 113; Purcell, Crim. Pl. and Ev. 132. The court refused to allow the motion, but intimated that they would consider any objections to the indictment upon a motion to quash. A motion to quash the indictment, was then made, and the following reasons assigned.

I. That the indictment is insufficient in this: that it does not set forth that the assault, which is one of the material acts alleged to have been committed by the defendant in the commission of the crime, was done wilfully, or with malice aforethought. 1 East, P. C. 346; 2 Hale, P. C. 184, 187; 2 Deacon, Crim. Law. 930; 1 Stark. Crim. Pl. (London ed. 1828,) 91. [In *Regina v. Drury*, 3 Cox, C. C. 544, (1849,) Wightman, J., read the judgment of Coleridge, J., who said, "Mr. Starkie, whose excellent book on Criminal Pleading may now be quoted as direct authority, lays down the same rule," etc.] See the precedents, Archb. Crim. Pl. (Am. ed. 1846,) 482; 2 Stark. Crim. Pl. (London ed. 1828,) 385, and note, (q); *Maile v. The Commonwealth*, 9 Leigh, 661. And so are the forms from the earliest to the latest cases. See *Regina v. Bird*, 1 Temp. & Mew, C. C. 437; 2 Denison, C. C. 94; 5 Cox, C. C. 1; 2 Eng. Law and Eq. Rep. 430; *Comm'th v. Webster*, Bemis's Rep. 1-3. It has been held, that where

malice aforethought was alleged in the assault, which was coupled with the stroke, to which malice aforethought was not alleged, the first allegation would be insufficient. 1 East, P. C. 346; 4 Coke, 41, *b*; Dyer, 69, *a*. But a contrary doctrine has been held. *Respublica v. Honeyman*, 2 Dall. 228; *Comm'th v. Gibson*, 2 Virg. Cases, 70. The reason of this is, because, if the first assault is with malice prepense, a subsequent homicide *se defendendo* would not excuse the offence. 2 Hawk. P. C. ch. 29, §§ 17, 18.

II. The indictment is insufficient in this: the mortal stroke is alleged to have been made with a sharp-cutting instrument, to wit, an axe, and a single wound thereby given, of which no description is set out so that the court may see that the wound was an adequate cause of death. 3 Chitty, Crim. Law, (Perkins's ed.) 734; 2 Deacon, Crim. Law, 928; 1 East, P. C. 342; 2 Hale, P. C. 185, 186; *The State v. Owen*, 1 Murph. 452, 454, 461, 464; *The State v. Moses*, 2 Dev. 452, 463, 464, 466; *The State v. Crank*, 2 Bailey, 66; 7 Dane's Abridgment, 275, ch. 218, art. 113, § 2; Davis's Justice, (1st ed.) 319; and so are all the precedents for incised wounds to this day. In the case of an incised wound which caused death, upon the necessity of the description, the authorities were uniform until the leading case of *Rex v. Moseley*, 1 Moody, C. C. 97; 1 Lewin, C. C. 189, A. D. 1825, which was twice discussed before all the judges, where it was decided that bruises, lacerations and wounds, all contributing to the death, need not be described, — Littlehale and Holroyd, JJ., dissenting, and holding the indictment invalid. It will be observed, that the law has never required the description of a bruise which did not make a technical wound. The reasons given for the decision in *Rex v. Moseley*, were, that it did not seem material to prove the description; and Lawrence, J., had instructed the clerk of assize of the Oxford Circuit to omit a description of the wounds where there were more wounds than one. The next case in order of time, in England, is *Rex v. Turner*, 1 Lewin, C. C. 177, A. D. 1830, which was the case of a *bruise*, and although decided on the authority of *Rex v. Moseley*, the hurt was described in accordance with the earlier decisions as to the necessity of a description of a bruise. The next case is *Rex v. Tomlinson*, 6 Car. & P. 370, A. D. 1834, where Patteson, J., doubted, but Park, B., decided, that the depth of a bruised wound made with a stone need not be de-

scribed, from his memory of *Rex v. Moseley*. Because, he said, that as common sense did not require the length, breadth, and depth of the wounds to be stated, it was not necessary that they should be stated, although all the text writers have assigned as a reason, that the wound is described, so that the court may see on the face of the record that such a hurt would be an adequate cause of death. It is to be remarked, that all the precedents in England, in a case of a simple incised wound, still give a description of the wound. These last two cases were decisions at nisi prius.

In America, the earliest reported decisions are the cases of *The State v. Owen*, 1 Murph. 452, A. D. 1810, and *The State v. Moses*, 2 Dev. 452, A. D. 1830, in North Carolina. In the last of which, even the dissenting judges admitted the law to be as here contended, so far as the description of an incised wound is concerned. It is digested, in Coxe's Digest of Reports of Decisions in the United States Courts, p. 359, referring to North Carolina cases, p. 79, *U. Stutes v. Maunier*, that the contrary has been decided. Upon examination no such case can be found. And it is to be observed, that afterwards, decisions in North Carolina, overruling the decision in *Maunier's case*, are found, in which no reference is made or notice taken of any such decision. The next case is *The State v. Crank*, 2 Bail. 66, A. D. 1831, which decides only that a bruise need not be described, while the reasoning of the court would seem to admit the doctrine here asserted. The next case is that of *Stone v. The State*, 2 Scam. 326, 338, A. D. 1840, where it is only decided, that such description is not bad on error, under the statute provisions of Illinois. The next case in order of time, is *Dias v. The State*, 7 Black. 20, A. D. 1843, where the depth of the wound is not described. But the judgment was reversed on other points, and that is not the point decided by the court. These, it is confidently asserted, are all the cases in this country on that point; and it is submitted, that not one is an authority in point against the position of the defendant. In Massachusetts, it was early laid down, that the description of such a wound was a necessary averment. 7 Dane's Abridg. *ubi supra*. And see Davis's Precedents of Indictments, p. 175, and note. It was the common law at the time of the Revolution, has been adopted here, and never doubted since.

After elaborate argument by counsel, and consultation by the court, Chief Justice Shaw stated that the court had considered the objections to the indictment, as though they had been taken by demurrer, or motion in arrest of judgment, and that the court were of opinion that the indictment was sufficient, although in the case of a simple incised wound, the authorities would support the position that a description is necessary. And the court distinguished this from an incised wound, because the indictment alleged that the defendant "did strike and bruise" the deceased.

The trial then proceeded, and after the evidence in behalf of the government was all in, the prisoner's counsel submitted to the court the following proposition, and prayed that it might be passed upon before opening the defence. That if the jury were satisfied from the evidence, that Chapman was only present aiding and abetting some other person who committed the act, this indictment, which charged him as the sole principal, would not be supported. *Comm'th v. Knapp*, 10 Pick. 477; *Duffey and Hut's case*, 1 Lewin, C. C. 194.

The court decided, that if the defendant was present, aiding and abetting, so as to make him a principal in the second degree, that evidence would support an indictment charging him as sole principal, as having struck the blow with his own hands.

The case then proceeded, and the jury disagreed.

Rufus Choate, Attorney-General, and *Charles R. Train*, District-Attorney, for the Commonwealth; and *B. F. Butler*, and *F. F. Heard*, Esqs., for the prisoner.

*Supreme Judicial Court of Massachusetts, Suffolk, ss.
March Term, 1853.*

SAMUEL SANFORD v. DARIUS HARVEY et al.

Landlord and Tenant — Termination of Tenancy — Notice to quit.

To terminate by notice a tenancy at will, where rent is payable at the expiration of each month, the notice must be given at least a month previously, and must either specify correctly the exact day upon which the month terminates, or must state generally that the tenant will quit the premises and terminate his tenancy in one month from the day when the rent shall next become due and payable, — such day being equally within the knowledge of the landlord and tenant.

ARCHIBALD LITTLE, on the 15th of October, 1849, hired, by parol, of the plaintiff, a house for one year, the rent to be payable monthly, on the fifteenth of each month. The defendants, on the 14th November, 1849, guarantied to the plaintiff the payment of the monthly rent during the year. January 2d, 1850, Little vacated the premises, and left the key with the son of the plaintiff at the plaintiff's office. On the same day the plaintiff notified the defendants of the fact, and that he refused to receive the key, that they could have it, and that he should look to them upon their guaranty for the rent. On the 3d January, plaintiff sent the key to Little's residence. On the 5th January, Little served upon the plaintiff the following notice.

"Boston, January 5, 1850.

To Samuel Sanford. Sir — You are hereby notified that I shall determine my estate at will in dwelling-house lately occupied by me, situated in Thatcher Court, in said Boston, one month from the day of the date hereof.

Archibald Little."

A precisely similar notice, dated January 16th, 1850, was served on the plaintiff on the day of its date. On the 15th February, 1850, Little sent the key to plaintiff, but he refused to receive it. The jury found specially, that the plaintiff refused to accept the key. The rent was fully paid to and including February 15th, 1850, and this action was for the rent due on the 15th March and 15th April. The question was, whether the tenancy at will was terminated by either of the notices.

S. C. Maine, for the plaintiff.

Bancroft and Dickinson, for the defendant.

The opinion of the court was delivered by

BIGELOW, J. — From the facts agreed, and the special verdict in this case, it appears that the defendants were sureties for one Archibald Little, by a written agreement for the rent of a house in Thatcher Court; that said Little occupied said house under a parol lease, commencing October fifteenth, 1849, the rent being at first payable monthly in advance, but subsequently, upon the giving of the said written guaranty by the defendants, payable at the expiration of each month; that said Little vacated said house on the second of January, 1850; that on the fifth day of said January, he gave the plaintiff written notice that he should determine his estate at will in the premises in one month from the day of the date of said notice; and on the

sixteenth day of the same month he gave another similar notice to the plaintiff of his intention to determine his lease in one month from the day of the date of the second notice. The rent was paid in full up to Feb. 15th, 1850, inclusive, and this action is brought to recover of the defendants under said written guaranty the rent for the two months ending on the fifteenth days of March and April, 1850. It is agreed that the tenancy commenced on the fifteenth day of the month, and that the rent became due and payable on that day in each month.

The only question raised upon these facts, is, whether either of said notices was valid and sufficient to terminate the parol lease under which said Little occupied the premises. It has already been decided, upon full consideration, that under Rev. Stat., ch. 60, § 26, a notice to quit when the rent is payable monthly, in order to be effectual for the purpose of terminating a tenancy at will, must expire in a month from the day on which the rent becomes payable, and that a notice to quit which breaks into the month and expires on an intermediate day, is invalid and insufficient. *Prescott v. Elms*, 7 Cush. 346. But the defendants contend that the present case is not governed by that decision, because the notice of January 5th, although insufficient to determine the lease on the 5th of February, for the reason that it would not expire on the day when the rent became due, would nevertheless be sufficient to terminate it on the fifteenth day of February, because the plaintiff would thus have received a notice which covered an entire interval of a month between the days of payment. But this position cannot be maintained. It is a well-settled rule of law, applicable to notices to quit, that, in order to be valid, the day on which the tenancy is to be terminated by the notice must be truly stated, and that any mistake in this respect will be fatal. The authorities all concur on this point, and are collected in Arch. N. P. 397. If therefore a person designate in his notice a day for the termination of a tenancy, which is not the day on which the rent is payable, or a day on which the tenancy can be legally made to expire by a notice, the notice is unavailing, and the tenancy may still continue. No one is obliged to regard a notice which fixes a day for the termination of a lease different from that on which a lease can be by law made to terminate. Such a notice, being one that neither party had a right to give, is treated as a

nullity. Upon this ground it has been recently decided, that under Stat. 1847, § 1, by which, in case of non-payment of rent, a written lease may be determined by fourteen days' notice to quit, a notice to quit forthwith is invalid. *Oaks v. Munroe*, 8 Cush. 282. It is by no means necessary to name the precise day and date on which a tenancy is to expire in a notice to quit, but it may be designated in general terms, if stated correctly. Therefore a notice to quit at the end of the month or quarter, (as the case may be,) which will expire next subsequent to the day when the rent shall again become due, without specifying the exact day of the month, would be sufficient to terminate a tenancy at will, under our statutes, after the lapse of the requisite time from the giving of the notice. If, for instance, in the present case, the notice to the landlord had been that the tenant would quit the premises and terminate his tenancy in one month from the day when the rent should next become due and payable, that would have been a good notice to terminate the tenancy, because it designated a day with sufficient certainty equally within the knowledge of the tenant and landlord. Notices to quit in this general form are frequently adopted in England. Arch. N. P. 397, 398. But in the present case, both of the notices given by the tenant designate as the day for the termination of the tenancy, one month from the day of the date of the notice. Neither of these fell on the day when the rent was due, but were intermediate days breaking in on the monthly tenancy. They were therefore insufficient, and the tenancy remained undetermined.

Judgment for plaintiff.

Recent English Decisions.

Court of Exchequer. — June, 1854.

WILLIAMS v. THE GREAT WESTERN RAILWAY CO.

Common Carriers — Corporation — By-Law.

One section of the charter of the defendant corporation provided that every passenger on the railway might take, free of charge, his articles of clothing not exceeding forty pounds in weight and four cubic feet in dimensions, at the risk of the company. The corporation passed a by-law allowing every

first-class passenger to carry 112 pounds of baggage free of charge, but declaring that the company would not be responsible for the same unless booked and paid for accordingly. In an action against the corporation to recover the value of articles of clothing of less weight than forty pounds, and of smaller dimensions than three cubic feet, the defendant pleaded the by-law, and that the articles had not been booked, &c. *Held*, that the by-law was inconsistent with the charter, and therefore void. The term "articles of clothing" includes all things necessary to the toilet.

THE declaration in this case alleged that the plaintiff booked himself and his luggage on the Great Western Railway, to be conveyed by the company from Paddington to Bristol for hire as common carriers, and that they so negligently conducted themselves that his portmanteau, containing, besides the usual articles of clothing, a dressing case, three brushes, one razor, one strop, one set of studs, and one bottle of scent, was lost. To this the defendants pleaded, that they had made a by-law under their acts, allowing every first-class passenger to carry 112lbs. weight of luggage free of charge, but declaring that the company would not be responsible for the same unless booked and paid for accordingly; and that the plaintiff was a first-class passenger, and had not booked or paid for his said portmanteau and its contents. The plaintiff thereupon replied, that as to certain of the contents of the portmanteau they were articles of ordinary clothing, not weighing 40lbs., and of less dimensions than three cubic feet; and as to the other articles above enumerated, he entered a *nolle prosequi*. The defendants then rejoined, that the luggage consisted of other things than articles of clothing, to which the plaintiff demurred.

Mr. *Cowling* now, in support of the demurrer, stated that the real question raised for the opinion of the court, was the legality of the by-law relied on by the defendants' plea. He was prepared to show that the company had no power to make any such by-law, as its terms were inconsistent and at express variance with the 169th section of the company's act (5th and 6th of Wm. IV., ch. 107), which allows every passenger on the railway to take, free of charge, his articles of clothing, not exceeding 40lbs. in weight and four cubic feet in dimensions, and limits the liability of the company, as carriers, to articles of clothing of passengers of such weight and dimensions. The 144th section authorizes the company to make by-laws for the good government of the railway, and for regulating the proceedings and pay of the directors, and for the manage-

ment of the undertaking, and of the officers and servants, which shall be valid and binding on all persons, provided that the same be not repugnant to the laws of the kingdom, or to any directions in the said act. It will be seen, therefore, that while by the 167th section of the company's act, every passenger is entitled to carry clothing to the extent of 40lbs. weight free of charge, for which the company are declared to be liable as common carriers, the by-law in question actually repeals that provision, and enacts that the company shall not be liable for any luggage whatever unless booked and paid for. This by-law was clearly *ultra vires*, and therefore invalid, and it might well be doubted whether the plaintiff was not entitled to recover, not only for his articles of clothing, strictly so called, but also for the excepted articles, for brushes, razors, strop, and a dressing-case, are necessary and usual accompaniments to passengers' luggage.

The CHIEF BARON. — The term "articles of clothing" ought to include all things necessary to the toilet. A man can't wear a razor or a brush, but he can hardly dress decently without such articles. We are at present of opinion that it was not competent to the company to make this by-law, and we would wish to hear the other side.

Mr. *Willes* rose to support the plea, but could not help feeling that he did not represent the popular side on this occasion. He was about to address a tribunal composed of gentlemen, who often travelled with luggage, and were very unlikely to fill the office of railway directors.

The CHIEF BARON. — You certainly are on the unpopular side.

Mr. *Willes*. — I quite feel that; but I nevertheless know that my clients will obtain justice if I can satisfy your Lordships, as I hope I shall, that this by-law is a reasonable one, and not in contravention of the general law or of the provisions of the company's act. The learned counsel then proceeded to argue that, as regarded the obligation to "book" luggage, the by-law must clearly be held to be a reasonable one; but it was so also as to the payment, and was one which, under the 144th section, taken with the 189th and 220th sections of the company's act, they had power to make. The 144th section might be admitted to be ambiguous; the words "for the management of the said undertaking" might or might not include the management of the traffic and the passengers; but, taken with the

other sections, the company contend they have power to make this by-law. The 189th section, for instance, gives power to make rules for regulating the travelling upon and the use of the railway and the travellers passing on it, and for preventing the smoking of tobacco and the commission of nuisances thereon. Under this section the company may make orders for the various classes of passengers and the affixing of labels on the luggage, which passengers must submit to, and the non-compliance with which will exempt the company from responsibility in case of loss.

Mr. Baron ALDERSON. — That may be ; but this by-law is a repeal of the 144th section of the act, which allows every passenger to carry 40lbs. weight of luggage, free of charge, at the risk of the company. How can the company by a by-law say they won't be liable unless luggage be booked and paid for, consistently with that section ?

The CHIEF BARON. — As to the rule requiring luggage to be labelled, that is quite another thing, and such a rule may be a reasonable one. Besides, the company, as any other carriers, might refuse to carry the luggage except on such conditions.

Mr. Baron MARTIN. — A railway company may make any rule for the government of its business, as any of the old carriers might ; but they can't make a by-law, saying they won't do that which their own act says they shall do.

Mr. Willes. — At all events, they may require the luggage to be booked.

Mr. Baron MARTIN. — That may be.

The CHIEF BARON. — They may say, first-class passengers shall travel in first-class carriages, and the second in second-class carriages, and they may insist on passengers allowing their luggage to be labelled and placed in certain carriages to facilitate delivery ; but all those are very different matters from making every passenger book and pay for his luggage, and saying they won't be responsible as carriers unless both be done. Such a by-law is clearly bad.

Mr. Willes. — If the Court is of that opinion, it would be idle for me to keep up the argument any further.

The CHIEF BARON. — We are all of opinion that this by-law is clearly bad. It is sufficient to say, that it is in direct contravention of the express provision of the 144th section. There must, therefore, be judgment for the plaintiff.

Mr. Cowling, at the conclusion of the case, could not

avoid expressing his surprise that the company should have thought it prudent to raise this question.

Mr. Baron MARTIN. — I quite agree with you. I wonder at it too.

Mr. Willes. — My friend might be content with his judgment.

Judgment for the plaintiff accordingly.

Court of Common Pleas. — June, 1854.

BUCKLAND v. JOHNSON.

Where goods have been converted, the plaintiff may either recover the value of his goods in an action of trover, or recover the proceeds of their sale in an action for money had and received, at his election; but he cannot elect to have a part of both remedies.

THIS was an action of trover for the conversion of goods, and for money had and received, the price of the goods, tried before Mr. Justice Williams, when a verdict was found for the defendant.

It appeared at the trial that the goods had been sold by the defendant and his son, jointly, and that the value of the goods had been recovered against the son for the conversion; but the goods having produced 50*l.* more than their value, this action was brought to recover that amount. In the present action the defendant pleaded judgment recovered. At the trial, an amendment was made in the pleadings to meet the matter in controversy between the parties. Mr. Serjeant Byles having on a former day obtained a rule *nisi* to set aside the verdict and enter it for the plaintiff, on the grounds that the plea as altered was bad in law, and not proved by the evidence.

Mr. Lush now showed cause against the rule; and Mr. Hawkins and Mr. Finlaison appeared in support of it.

The Court were of opinion that the rule ought to be discharged. The Court thought Mr. Justice Williams right in the amendment, and that the plea as amended was proved. There had been a substantial recovery from the son to bar the action. The plaintiff might either recover the value of his goods in an action of trover, or recover the proceeds of their sale in an action for money had and received, at his election; but he could not elect to have a bit of both remedies.

Rule discharged.

Miscellaneous Intelligence.

RELATION OF THE MILITARY FORCE, WHEN CALLED OUT TO SUPPRESS RIOTS, TO THE CIVIL POWER — JUDGE HOAR'S CHARGE TO THE GRAND JURY. We give below a portion of Judge Hoar's charge to the Grand Jury at the July term of the Municipal Court. It is an authoritative exposition of the law upon a subject which has excited considerable discussion recently in the newspapers.

"Gentlemen, recent occurrences in this city have made it my duty to instruct you upon another subject, of the highest importance to the peace and security of the community, and intimately connected with principles which lie at the very foundation of our frame of government. I refer, as you already anticipate, to the relation of the military power to the civil authority of the Commonwealth. But a few weeks have gone by since the citizens of Boston saw in their midst a large body of soldiers assembled, the volunteer militia of Massachusetts, engaged, as it has been asserted, in preserving the peace of the city, and maintaining the supremacy of the laws — an honorable and responsible duty, whenever it is lawfully assumed, and faithfully discharged.

From what necessity or cause these soldiers were assembled; under what authority they acted; whether their employment and their conduct were in conformity with the constitution and laws of the Commonwealth — and to whom the responsibility of their acts attaches — are questions which have been publicly discussed, and which it is not improbable that you may be obliged to investigate. The law applicable to them I shall endeavor as briefly and plainly as possible to state to you. And, gentlemen, while the chief reason for so doing is on account of the bearing it may have upon your practical duties, the occasion seems to me opportune so far as it may aid in diffusing just sentiments and a distinct understanding upon a subject concerning which precision of ideas is so important, and upon which so many confused notions seem to prevail.

With the holiday soldier — the bright array, the martial music and waving plumes, which most of us regard with complacency, and which afford such delight to the juvenile spectators — we are all familiar; with the soldier as the terrible instrument of the law, the last resort of the civil government for the absolute enforcement of its authority, we are happily unfamiliar. The cases in which it has been necessary to resort to an armed force to sustain the civil government of this commonwealth, have been of rare occurrence; and when such occasions have arisen, the moderation, prudence and sound discretion of those who were entrusted with civil authority, and the firmness, forbearance, and exemplary deportment of the soldiers, have been such as to lead to no discussion as to the legality of their conduct.

It is extremely desirable, for the sake of the militia themselves, that the extent and limitations of their powers should be justly defined and familiarly known. They wish to understand their duty, and to do it. They are neither strangers, nor aliens. Their interests are identical with ours. They are some of our acquaintances, friends, and neighbors, who have undertaken a particular public service. Interested in its more exciting and cheerful aspect, they are also willing to contemplate its more serious fea-

tures. They are liable to be placed in trying situations, and upon a sudden emergency to be required to do acts of the most painful nature. The importance of an accurate apprehension of legal rights and duties, upon such a subject, can hardly be overrated. A duty more serious, a responsibility more fearful, can hardly devolve upon man, than that which belongs to the citizen-soldier when lawfully summoned to aid the civil power in upholding or executing the laws. He should enter upon it in a serious and thoughtful spirit, regarding it only as a sad and terrible necessity.

Consider gentlemen, for a moment, the sacredness with which human life is invested by the law, the solemnity which the lawful destruction of it every where assumes. The life of the vilest wretch among us, who has outraged all the laws of God and man, cannot be taken, in the administration of public justice, and as the penalty of his crimes, but upon proceedings, where every provision that the wit of man can devise, is made against the possibility of haste, or errors, or oppression. He must be indicted by a grand jury; the supreme judicial tribunal of the State must be assembled; he must be found guilty by a jury, substantially of his own selection from a large number of the most discreet and respectable of his fellow-citizens; able counsel are secured for him; witnesses are provided for him at the public expense; he is to be notified beforehand of the names of the witnesses against him; and when his guilt has been fully established, no man has power to harm him until the Supreme Executive shall have determined that there are no grounds for the interposition of its merciful prerogative, and have commanded the sentence of the law to be enforced.

In self-defence, in obeying the instinct of self-preservation, a man must retreat as far as he can, before he may lawfully resort to a deadly weapon and slay his adversary.

But when a military force is employed to suppress a riot, a hundred lives may be sacrificed in a moment, without preparation—it may be almost without warning—the innocent with the guilty. The soldier who fires upon a mob may doom to instant destruction not only the lawless and depraved, but men of generous impulses and honest purposes—the *mistaken*—the *mised*—the *unwary*—those whom accident or curiosity have brought to the spot; perhaps his friend, his neighbor, his relative.

The public service which he is thus called upon to discharge, is a subject for no boasting beforehand, nor exultation afterward. No man of right principles or feelings should regard it lightly. He should go to it as he would go to attend an execution, and return thanking God for all that he had been rightfully permitted to leave undone.

It is sometimes said that our government rests, at last, upon military force. It rests upon no such thing. It finds its chief strength in the respect of an intelligent and virtuous people for the laws which they themselves have made; and its ultimate reliance is upon the power of the people to execute their own will. The military force which a free people allows to exist among them, it regards but as a convenient instrument.

To understand clearly the points involved in this inquiry, it will be well to recur a little to first principles.

The object of a constitution of government, is, in the Preamble to the Constitution of Massachusetts, declared to be,

'That every man may, at all times, find his security in the laws.'

To this end, two things were of the first necessity. 1. The maintenance and enforcement of such wholesome laws as should be enacted; and 2. The protection of the liberty of the citizen from the encroachments and abuse of authority of those to whom power should be intrusted. With a view to the first, the constitution provides for the organization and

government of militia ; and, in reference to the latter, the Declaration of Rights contains this article :

'The people have a right to keep and bear arms for the common defence ; and as, in time of peace, armies are dangerous to liberty, they ought not to be maintained without the consent of the legislature ; and *the military power shall always be held in an exact subordination to the civil authority, and be governed by it.*'—Dec of Rights, Art. xvii.

By the Constitution, the Governor is made the commander-in-chief of the militia, and intrusted with full power to discipline, instruct, and govern them ; and to employ them against the public enemies. He is also authorized to govern them by law martial, when in actual service, in time of war or invasion, and also in time of rebellion, *declared by the Legislature to exist* ; with all the powers incident to his office, to be exercised agreeably to the constitution and laws of the land.

His powers in respect to calling out the militia in case of war, insurrection, or invasion, made or threatened, are determined by law, (Rev. Stat. ch 12, § 129 *et seq.*) and are only to be exercised by the Governor in person, or in case of emergency by the commanding officer of a division.

With the nature of these powers and duties we have no immediate concern.

I come then to the question, What are the provisions of law for the suppression of riots and unlawful assemblies, and for executing the laws of the Commonwealth, when forcibly resisted ?

These are of a two-fold nature : First, the modes which the common law authorizes, in the absence of positive enactment ; and Secondly, the powers expressly conferred by the statutes — each being, of course, limited and controlled by the principles of the Constitution.

I have already given you the definition of a riot or unlawful assembly ; and by the common law, any citizen may lawfully endeavor to suppress an existing riot, by resisting those who are engaged in it, and preventing others from joining them.

A sheriff, constable, or other peace officer, may do the same, and may command all other persons present to assist him.

He may also arrest any of the rioters whom he finds committing any breach of the peace, and take them before a justice. Any justice of the peace who shall find persons riotously assembled, may arrest them ; and by a verbal command may authorize others to arrest them ; and the persons so commanded, may pursue and arrest the offenders, in the absence of the justice, as well as in his presence.

The general principles of the law — that if any person is lawfully employed, and is assaulted, he may use such force as is necessary in self-defence ; and that a person charged with the execution of a legal duty may repel, by force, any unlawful and forcible resistance to its performance — apply in these cases.

The power of the mayor and aldermen of cities, and of the selectmen of towns, to secure an adequate civil force by the appointment of police officers, is unlimited. Stat. 1851, chap. 162.

The statute of this Commonwealth, which provides for calling out the militia to aid in the suppression of riots or tumults, and in executing the laws, is the statute of 1840, chap. 92, sects. 27 and 29 ; and in all essential particulars it is an exact transcript of the 134th section of the 12th chapter of the Revised Statutes ; with this exception, that it adds, for the first time, *Mayors of Cities* to the list of those by whom an armed force may be called out.

These sections are as follows.

Sect. 27. 'Whenever there shall be, in any county, any tumult, riot, mob, or any body of men acting together, by force, with intent to commit any felony, or to offer violence to persons or property, or by force and violence to break and resist the laws of this Commonwealth, or any such tumult, riot or mob, shall be threatened, and the fact be made to appear to the commander-in-chief, or the mayor of any city, or to any court of record sitting in said county, or if no such court be sitting therein, then to any justice of any such court, or if no such justice be within the county, then to the sheriff thereof, the commander-in-chief may issue his order, or such mayor, court, justice or sheriff, may issue his precept, directed to any commanding officer of any division, brigade, regiment, battalion or corps, to order his command, or any part thereof, describing the kind and number of troops, to appear at a time and place within specified, to aid the civil authority in suppressing such violence and supporting the laws, which precept, if issued by a court, shall be in substance as follows:

[L. S.]

ss.

COMMONWEALTH OF MASSACHUSETTS.

To (insert the officer's title) A. B., commanding (insert his command.)

Whereas, it has been made to appear to our justices of our ———, now holden at ———, within and for the county of ———, that (here insert one or more of the causes above mentioned) in our county of ———, and that military force is necessary to aid the civil authority in suppressing the same: now, therefore, we command you that you cause, (here state the number and kind of troops required,) armed, equipped, and with ammunition, as the law directs, and with proper officers, either attached to the troops or detailed by you, to parade at ———, on ———, then and there to obey such orders as may be given them, according to law. Hereof fail not at your peril, and have you there this writ, with your doings returned thereon.

Witness, &c. * * * And if the same be issued by any mayor, justice or sheriff, it should be under his hand and seal, and otherwise varied to suit the circumstances of the case.'

Sect. 29. 'Such troops shall appear at the time and place appointed, armed, &c., and shall obey and execute such orders as they may then and there receive, *acco ding* to law.'

The noticeable points of this statute are, that it allows a military force to be called out, not only when there is a riot, mob, &c., but whenever one is *threatened*; that it fixes the persons by whom the existence of the riot, &c., or the fact that one is threatened, shall be ascertained and determined; provides that the reason of calling out the military shall be stated in the order or precept; and then leaves the mode in which the troops shall be employed 'to the civil authority in suppressing violence, and supporting the laws,' to be fixed by the rules of the common law, or by other statutes.

If summoned according to the provisions of this statute, when they appear at the place named in the order or precept, they are lawfully assembled; the fact that a sufficient necessity existed for their assembling, is, so far as they are concerned, conclusively settled; and the question then arises, What may they lawfully do? To whose orders are they subjected? And how are such orders to be given?

In the first place, they have all the rights at common law, or under the general laws of the Commonwealth, which other citizens possess. 'It is clear,' in the language of an eminent Judge, 'that the military do not lose the rights, and are not exempt from the duties of subjects, by entering into that condition.'

They may occupy the place at which they were directed to appear, so

long as by the orders which they may have received from the governor, judge of a court, sheriff, or mayor, or as they may there receive from any lawful authority, they are required to remain. They may march through the streets as on other occasions, not interfering with the reasonable use of the same by other persons; they may act in defence of their own persons and lives, if attacked or assaulted, using such force as is necessary and proper to repel the assailants.

They are not disqualified to act as the assistants of any civil officer, who has the right to call on the citizens to aid him in the service of any process, civil or criminal, or in the execution of his duty under the laws; and although their being engaged in military service would be a sufficient excuse for not obeying any call upon them as individual citizens, by a person not authorized to direct the movements of the collective force, yet if they should obey the call, their acts would be in no degree unlawful, so far as those persons might be concerned against whom their acts were directed. If, without objection from their commanding officer, and without interfering with their obedience to any lawful orders given them, any of them should act as individuals to prevent a breach of the peace, or to stay a rioter, or arrest a felon, the right to do so would be as unquestionable as if they wore a different dress. For every injury done to them, or indignity offered, the offending person is, and ought to be, civilly and criminally responsible, as for a like offence to any other citizen; and with this aggravation of the wrong, that the very position which the soldier occupies, and the nature of his duties, may render it difficult for him to detect the offender, and take from him the power to make any resistance to the crime.

I come, then, gentlemen, to the consideration of the farther powers for suppressing tumults and enforcing the laws, which are contained in the 129th chapter of the Revised Statutes.

The first section provides that if persons, to the number of twelve or more, being armed, or to the number of thirty, whether armed or not, shall be unlawfully, tumultuously, or riotously assembled in any city or town, the mayor and each of the aldermen of such city, and each of the selectmen of such town, and every justice of the peace therein, and the sheriff and his deputies, shall go among or near the persons so assembled, and require them to disperse; and if they do not disperse, then to command the assistance of all persons present in arresting the offenders. The second and third sections provide for the punishment of officers neglecting or refusing to act, and of other persons who refuse or neglect to assist.

The fourth section authorizes any two of the officers before named, on the refusal or neglect of the unlawful assembly to disperse, to require the aid of a sufficient number of persons, in arms or otherwise, and to 'proceed, in such manner as in their judgment shall seem expedient, forthwith to disperse' the assembly, and arrest the persons composing it.

The fifth section is as follows.

'Whenever an armed force shall be called out, in the manner provided by the 12th chapter, for the purpose of suppressing any tumult or riot, or to disperse any body of men, acting together, by force, and with intent to commit any felony, or to offer violence to persons or property, or with intent, by force and violence, to resist or oppose the execution of the laws of this commonwealth, such armed force, when they shall arrive at the place of such unlawful, riotous or tumultuous assembly, shall obey such orders for suppressing the riot or tumult, and for dispersing and arresting all the persons who are committing any of the said offences, as they may have received from the governor, or from any judge of a court of record, or the sheriff of the county, and also such further orders as they shall

there receive from any two of the magistrates or officers mentioned in the first section.'

The sixth section, which is by a subsequent statute (1839, chap. 54, § 1,) extended to all cases under the two preceding sections, provides that if by reason of the efforts made by any two of the said officers or magistrates, or by their direction, to suppress the unlawful assembly, &c., any person, though but a spectator, should be killed, the said magistrates and officers, and all persons acting under them, shall be held guiltless: and, that if the officers or their assistants, or persons acting by their order, should be killed or wounded, all the rioters, and all persons who had refused to assist the magistrates or officers, shall be held answerable.

It is apparent, from this statute, that it applies only to cases where a riot, tumult, unlawful assembly or body of men, collected with intent to do the unlawful acts referred to, actually *exists*. It authorizes no forcible acts, by way of precaution. And, gentlemen, none are authorized by law. The power to call out a military force, and hold them in readiness for the emergency when it shall arise, is given by the statute of 1840, to which I have previously referred. But the power extends no farther. And, as a practical rule, which will be decisive of some questions that may come before you, I shall instruct you, that

There is no law in this Commonwealth by which any district, or part of a city or town, can be put into the possession of a military force in time of peace, with power to obstruct the ordinary and reasonable use of the public ways, and to prevent peaceable citizens from transacting their lawful business — merely on account of an anticipated riot.

The fact that a riot has previously taken place, unless it be continuous and existing, will not alter the rule of law. And if it shall be made to appear to you that a military force has been so employed within the county of Suffolk, and any man has been assaulted or injured thereby, or forcibly prevented from enjoying his ordinary rights as a citizen, without other justification under the law, then every soldier who may have committed any such act of violence, and every officer, military or civil, who shall have ordered, requested, caused, or procured it to be done, is subject only to the qualification which I shall presently state, to be held responsible therefor.

But it is asked, whether, in a case where no man doubts that a riot or unlawful assembly is impending, the civil and military commanders are obliged to wait until irreparable mischief is done, till a prisoner is rescued, a building destroyed, or blood spilled before they can fully interpose? A sufficient answer may perhaps be found in the statement, that they may employ all the ordinary and peaceable means of enforcing the civil authority, and may have in readiness for instant employment, any amount of military force which the exigency shall demand. Further than this the law does not go, and the magistrate or officer cannot. It may seem to many worthy and prudent men that more power should be granted — but it has not been thought necessary or expedient by the framers of our constitution and laws. The principle of American institutions is not restraint — nor intimidation — but responsibility for acts done. In relation to freedom of speech, for example, and of the press, we do not, as in some countries it is done, establish a censorship, and determine beforehand what shall be spoken or published, but we leave men free to say or print what they please, and hold them accountable for any abuse of the liberty.

In the next place, gentlemen, the statute confers *no discretionary power* upon any military officer, under the commander-in-chief, nor can any be lawfully conferred upon him, except as to the details of executing a specific service, upon which he is lawfully ordered. And this is in strict

conformity with the requirements of the Constitution, "that the military power shall always be held in exact subordination to the civil authority, and be governed by it." It is for the civil magistrates only to determine whether an unlawful assembly exists, and whether military power is needed to suppress it. If any civil magistrate should direct the commander of a military force, lawfully called out to aid in suppressing an anticipated riot, to take possession of a city or district, dispose his force therein as he should think expedient, and then, whenever in his judgment a riot should commence, or an unlawful assembly be gathered, to fire upon or disperse it—leaving the whole question of the occasion and necessity to the discretion of the commander—such an order would be of no legal validity, and the military officer could not justify any act done under it, which would not have been legally justifiable if no such order had been given.

The details of military service must, of course, be left to the officer commanding the troops—but the service required must be designated by the civil authority. Thus when a riot exists, the civil magistrates competent to act, may say to the officer, clear this street—dislodge the occupants of this building—disperse this assembly—arrest these rioters—protect these buildings—and the officer receiving the order may employ his force to execute it in such a manner as he may think best. He may send one file of men or ten; he may charge with bayonets or sabres; he may fire blank cartridges or bullets; he may, unless the order is countermanded, decide how many times he shall charge or fire, and when the assembly is sufficiently dispersed. But a general direction to preserve the peace of a city, and sustain the laws, can give to a military force no new protection or power.

On the other hand, if the orders given proceed from a competent civil authority,—although, in my judgment, the law clearly contemplates that the resources of the civil power should usually be applied so far as they reasonably can be, before resort is had to the military, yet a discretion is given to the civil magistrates to determine when military force is needed—and even if they have judged erroneously, the soldier who obeys these orders is protected—and the correctness of the decision cannot be questioned to his prejudice.

The statute further provides, that the discretion in the use of an armed force which it confers, shall be exercised by two of the officers named in the first section jointly. It cannot be assumed by one alone. And further, the action of the two must be direct and positive. It is not sufficient that one shall be merely consulted by the other, and approve, or not object. Both must act. Both must assume the responsibility. It must be the order of both. Not that both must speak or write, but if one speaks for the two, it must be with a direct authority to speak in the name of the other.

The law plainly requires that both should be *present*. Not, of course, that they should be between the soldiers and the mob, not that they should ride with the military commander, or charge with his troops,—but *present*, in a reasonable sense of that phrase, applicable to the nature of the case; *present*, as a commander is present on the field of battle; *present*, so that they can have personal cognizance of the fact that military force is necessary; that they may direct its application, and be enabled to decide upon new exigencies as they arise, and to determine when the terrible necessity is ended.

There is, in my judgment, a strong and clear implication, from the language of the 12th and 129th chapters of the Revised Statutes, although not so distinctly expressed as would be desirable, that the governor, judge of a court of record in any county, or sheriff, may not only call out the

militia, but, in case of an existing riot, may give specific orders in regard to its suppression. This view is confirmed by the statutes of 1839, chap. 54, sect. 1, of which a part of the provisions could hardly have any intelligible effect, if it were not so. It is the general duty of the governor to cause the laws to be executed, and it is a common thing to invest the judge of a court of record with powers which it requires two inferior magistrates to exercise. It also seems to me that the actual presence of these higher officers of the State, could not be contemplated or required. They must act upon evidence and information; and the legislature must have supposed that the nature of their ordinary duties, and their relation to the Commonwealth, would insure a competent knowledge of their legal power, and caution in its exercise.

The question has, I believe, no immediate practical bearing — but a statement of it seemed necessary to a complete view of the subject.

In Suffolk county, it could hardly arise, except in the case of the governor or a judge; as there is probably never a time when some judge of a court of record is not found within this city, and the sheriff would not therefore be called upon to act alone.

Another question, of much practical importance, is, how far the private soldier, or the inferior officer, is answerable for an act of violence done in obedience to the command of his superior, that command being given without lawful authority? If a captain order his company, who have been lawfully called out to aid the civil authority, to fire upon a crowd, or to drive back any persons who are passing along or across a street, or to clear a building, or the like, and the captain has no order from the commander of the force which would authorize him to give such a direction, or the commander himself has no legal authority from the civil magistrates, would the private soldier, who should in good faith obey the order, be protected? Unquestionably the person with whom the illegal order originated, would be responsible to the fullest extent; and in respect to the subordinate, I shall instruct you substantially in the language of a recent decision of the Supreme Court of the United States.¹

Upon authority, and upon principle, independent of the weight of judicial decision, it can never be maintained that a soldier or military officer can justify himself for doing an unlawful act, by producing the order of his superior. The order may palliate, but it can not justify. If the power exercised by the superior were within the limits of a discretion confided to him by law, the inferior would be justified by the order, even if the commander had abused his power. But I have already said that the law does not confide to him a discretionary power, except as to the mode of executing the lawful commands of the civil authorities. But there are cases when the soldier may be called upon to act in a sudden emergency without the possibility of learning with absolute certainty the origin of the orders given him. If, in such a case, the subordinate acts in *good faith* and with *due diligence*, acting upon such information as he had a right to rely upon, and upon all the information reasonably in his power to obtain, and which, if reliable, would render his act legal, the order of his superior will exonerate him from any *criminal* responsibility, although the information should afterward be discovered to be false or erroneous.

A point which may incidentally arise, respects the occasion upon which the troops were called out on the 2d of June last. It may be found that they were called out in aid of the civil authority, to preserve the peace of the city, which was endangered by a threatened resistance to the execution of a process of the United States. A few words upon this subject are all that are necessary.

¹ *Mitchell v. Harmony*, 13 Howard, U. S. R. 187.

We are all of us not only citizens of Massachusetts, but citizens of the United States. Our relation to the government of the United States is a relation as individuals, except where the constitution and laws of the Union have otherwise specially provided. The State militia cannot, as an organized force, be legally called into the service of the United States, except by a requisition of the President of the United States upon the governor, and according to the constitution and laws.

Our State officers have nothing to do, in their official capacity, with executing the laws of the United States. United States officers, if resisted in the discharge of their duty, may call upon citizens of the State to aid them in executing process, and it would be the duty and right of each citizen to obey the call, unless he were lawfully excused. A lawful excuse would be, that the person whose aid was required was engaged in a public duty under the government of the State. Congress may confer upon officers of the United States, powers to prescribe duties which are analogous to those of certain classes of State officers; but this can apply only to the discharge of their official duties under the laws of the United States, and can give them no authority to interfere with the execution of State laws, or to control or exercise any authority over any State organization, or to assume the specific functions of any State officer.

But, on the other hand, all acts done by an officer of the United States in the discharge of his duty, are to be regarded as lawfully done under the laws of a State. And if, in resisting the execution of the laws of the United States, any breach of the peace should occur, or any other violation of State laws, it is the duty of the State officers to repress or punish it as they would if it were happening to the injury or disturbance of any other citizens lawfully employed.

Thus, to apply these principles, the United States Marshal of a district has no official relation, as such, to a Massachusetts justice of the peace, or to the mayor of a city, or sheriff of a county. He cannot call out the militia of a State, nor give them any legal order when mustered, either alone or in concurrence with any State officer. Although Congress has conferred upon him the authority of a sheriff, this obviously can only mean the same functions in executing the laws of the United States that a sheriff has in relation to the laws of a State. He cannot serve a writ from a State court, nor undertake to execute a State law. But these principles are too clear and well settled to require further illustration. And now, gentlemen, it remains for you to apply the rules of law which I have given you.

If our citizen-soldiers, lawfully mustered in the public service, have been assaulted or injured, see to it that the aggressor, if he can be discovered, shall not go unpunished.

If it shall be made to appear to you that any assault has been committed, or violence done, or forcible obstruction of lawful business occasioned by any part of the military force, 'diligently inquire, and true presentment make,' concerning it. Ascertain under what order, or by what authority it was done. Trace it to its source. Consider what is its justification. Extend the full protection of the law to every thing which a liberal construction of the law can justify or excuse. But if you find the law has been violated, and that there has been an invasion of private rights, or an infringement of public liberty, do your duty, as you have sworn to do it — and 'leave no man unrepresented, for love, fear, favor, affection, or hope of reward.'

It may be said, that there was a great public exigency, an imminent danger; that riot and bloodshed were prevented; that there has been no considerable destruction of property, no serious personal injury inflicted, no sacrifice of life; and that it would be harsh and unwise to subject to

criminal responsibility those who have acted with general good intention. Gentlemen, this is a very superficial view of the matter. All right-minded men are opposed to lawless violence. The whole community cry out against it. But when law is disregarded by its own guardians and supporters, it is 'wounded in the house of its friends,' and all sentiments of reverence for law in the public mind are weakened.

The old Latin maxim tells us, Oppose beginnings — '*Obsta principiis.*' Occasions where the gravest consequences have not followed, and the strongest passions are not excited, are the best to establish principles and define duties.

And if the facts which shall be laid before you require it, I have no doubt, gentlemen, that you will be ready to show to the people of the State, that laws are not made for those only who crowd the gallery or fill the dock; that whenever the strong arm of power has been raised without justification, and any citizen has suffered in his person or property, the whole community feels the wound, and that the justice which is no respecter of persons will allow no military or civil title to give immunity to the transgressor."

THE "CHEAP SHOP" AND THE "FAST" COURT. — Lord Brougham was last week complaining to the House of Lords of the heavy fees in the county courts, and comparing the cost there with the cost of obtaining a judgment in the superior courts, greatly to the advantage of the latter, when Lord Campbell, who has a deal of fun lurking under his good sense, interrupted the orator with the remark, that "Ours is the cheap shop after all."

A few days before, in a debate upon the Ecclesiastical Courts Bill, an objection to the transfer of the business to the Court of Chancery was raised, upon the assumption that there was a holy horror of that court, because, once in it, it is very difficult to get out of it; whereupon Lord St. Leonards (no mean authority) and the Lord Chancellor protested that this objection, however applicable to Chancery as it was, had no validity against the court as it is; for that, in its reformed state, in no court in the kingdom could a decision be obtained *so quickly* as now in the Court of Chancery.

Strange as it may appear, both of these assertions are strictly true. It is a fact — and not the least remarkable of the changes our time has witnessed — that the superior courts of common law at Westminster, are now, as Lord Campbell jocosely termed them, "*the cheap shops*;" and the courts of equity, "*the fast courts*." You can obtain a judgment in the Queen's Bench at less cost, and in the Court of Chancery in less time, than in any other courts in the kingdom.

When the county courts were established, they were welcomed as vast improvements. You could obtain judgment there in a month, and at a cost of two or three pounds. But the other courts have taken a lesson from their younger rivals, and improved the teaching; and now they have positively beaten them in the race. You can go to the Queen's Bench with an undisputed demand, and obtain judgment and execution in ten days, at a cost of about thirty-six shillings; whereas in the County Court, even if your demand is undisputed, you must wait till the court sits perhaps for a whole month, and then you must go with all your witnesses, at great cost and inconvenience, to prove your claim, and you must pay fees greater than the entire cost of obtaining judgment in the Superior Court, and, after all this, you will probably be deprived of the fruit of the judgment you have paid for so heavily, by an order that the defendant shall pay by instalments, giving you the trouble of a monthly search to ascer-

tain if he has paid, and, if he fails, putting you to the cost and trouble of taking out another summons, which must be served personally, and of again appearing at the court to enforce it.

All these obstacles to justice have been removed from the Superior Courts, so that now they offer immense advantages over the County Courts for the recovery of undisputed demands. It is otherwise with disputed claims. There the Superior Courts put themselves under comparative disadvantages by appointing but two seasons in the whole year for trials. It is of little use to suitors to facilitate process, if, after the preliminaries are completed in a fortnight, they must wait six months before they can have a trial. Let the Superior Courts remove this last remaining impediment to their perfect adaptation to the requirements of the community, and Lord CAMPBELL might add the boast of Lord ST. LEONARDS, in regard to the Equity Courts, to his own, and say of them that they are *both cheap and fast*.

And the Court of Chancery is "a fast" court. You can file a claim, and not impossibly obtain a hearing and decree, in a fortnight. This dispatch of business has been much facilitated by the practice of distributing it about among the several Courts, so as to equalize the work as nearly as possible. If this practice were introduced into the Common Law Courts, as we have respectfully ventured to recommend, the same results would doubtless be seen.

The public are profoundly ignorant of these results of the recent law reforms. The Courts cannot get rid of the ill name that clings to them, and it will be a long time, perhaps, before they do so. But even the lawyers are scarcely conscious what a revolution has been accomplished, especially in the Court of Chancery; and we have directed their attention to it thus pointedly, that they may turn it to such uses, for the benefit of their clients, as their experience will show might be made in many ways of a procedure at once so speedy and so cheap. — *From the Law Times of April 22d.*

MARRIAGE COURT — *Before Judge Thompson.* Claim for procuring a marriage. George Hiltman, assignee of Degroot, against H. Stickler, to recover \$125 for alleged work, and labor and services. For the defence Mr. Degroot was put upon the stand. It turned out that he introduced defendant to a young German girl, who had \$1000, and as he did not choose to marry her himself, he undertook to induce her to marry defendant in consideration that the latter should pay him after being married \$125. The defendant agreed to the proposal, and married the young lady. After the marriage, however, he declined to pay the \$125. It was contended, in defence, that the consideration was illegal and contrary to good morals. The Judge took that view of the case and dismissed the complaint. — *N. Y. Tribune.*

Notices of New Books.

AN INTRODUCTION TO THE STUDY OF THE ROMAN LAW. By LUTHER S. CUSHING. 1 vol. pp. 243. Boston: Little, Brown & Company, 1854.

This is a modest and unpretending, but most interesting and useful volume. It supplies a want which has long existed. In a plain, perspicuous, and intelligible manner, it furnishes an introduction to the study of

the Roman Law; so clear and attractive that the student wishes to learn more, and has the path made straight before him; and yet so full that if the reader only masters thoroughly the contents of the volume, he will have a general knowledge and idea of the Roman law, its administration, literature and history. Even beyond this, the work is valuable as a glossary of many of the terms of the civil and Roman law in common use, for its very full chapter upon the mode of referring to or citing the books of the Roman law; and for its appendix, containing a table of the subjects of the several titles of the Institutes, Digest and Code, arranged in alphabetical order.

The work was originally prepared as a short course of lectures before the students of the Dane Law School, where, in 1848-49, the author was a special instructor. The plan of the treatise is thus stated: "Considering then that a thorough knowledge of it, [the Roman law] is entirely out of the question, as a branch of preliminary education in this country, two alternatives remain; either to present a general and brief outline of the system, or to explain so much and such parts of it, as to enable the student to prosecute the study further, if he may think proper. The latter course there can be no doubt, will be altogether the most advantageous. It will be the purpose of this introduction, therefore, not so much to explore the vast field of the Roman law, as to point out the way by which the student of jurisprudence may do it for himself." In carrying out this plan, the author first explains and defines the terms Roman law and civil law; then states the distinction between legislation and jurisprudence; then gives in separate chapters the history of Roman legislation and jurisprudence anterior to the time of Justinian; then the revision of the Roman law by Justinian; the account of the law schools in the time of Justinian; the legislation of the conquerors of the western empire; the history of the Roman law since the time of Justinian. The other chapters of the volume explain the mode of citing treatises on the Roman law, and state fairly, and not too strongly, the utility of its study.

The chapters on the history of Roman legislation and jurisprudence are prepared with special care. Enough is given to explain and interest, but not so much as to weary. We think that the publication of this volume will do much to instruct the profession in the history, principles and literature of the Roman law; to be entirely conversant with which is an accomplishment which few lawyers in those States where the common law prevails, can be expected to attain, but to be entirely unacquainted with which, now that this volume is published, is to be disgracefully ignorant.

THE EXCHEQUER REPORTS. Reports of Cases argued and determined in the Courts of Exchequer and Exchequer Chamber, Vol. VIII. Trinity Vacation, 15 Vict., to Trinity Term, 16 Vict., both inclusive. By W. W. WELSBY, E. F. HURLSTONE, and J. GORDON. With references to decisions in the American Courts. J. I. CLARK HARE, Editor. pp. 958. Philadelphia: T. & J. W. Johnson, Law Booksellers., No. 197 Chestnut Street. 1854.

We have already frequently expressed our opinion of the value of this series of reports. And the present volume, both as regards the reported cases, and its careful preparation, and the full notes, by the American editor, is equal to any of the preceding ones. We have room to refer to but one or two of the cases; and there is but little need to do so, as these reports are found upon the table of most lawyers. *The Great Northern Railway Company v. Shepherd*, p. 30, is a decision as to the liability of

carriers of passengers, at common law, for the luggage of passengers. The court hold that the carrier is responsible for the *personal* luggage only, and not for merchandise among the personal luggage; but he is liable for merchandise when it is carried openly, or so packed that its nature is obvious, unless he objects to carry it. The case also decides a point which the railroad company must have been hard pressed to take, that, where the statute allows each passenger to carry half a hundred weight of luggage, a husband and wife travelling together are entitled to carry one hundred weight. The judges further held, that the luggage of a passenger by railway, though never delivered to any servant of the company, but kept by the passenger during the journey, is nevertheless, in point of law, in the custody of the company, so as to render them responsible for its loss.

Insolvents in Massachusetts.

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Commissioner.
Abbott, Thomas E.	North Reading,	May 18,	Asa F. Lawrence.
Adams, Amos	North Brookfield,	" 2,	Alexander H. Bullock.
Allen, George L.	Worcester,	" 22,	Alexander H. Bullock.
Bailey, Charles F. et al.	Newton,	" 15,	Asa F. Lawrence.
Barrett, Francis	Weymouth,	" 11,	Francis Hilliard.
Bartlett, George W.	Chelsea,	" 5,	John P. Putnam.
Belcher, Philander J.	Holliston,	" 1,	Asa F. Lawrence.
Berry, Henry	Andover,	" 22,	John G. King.
Bisbee, Joseph E.	East Bridgewater,	" 16,	Welcome Young.
Bodwell, Nathaniel	Woburn,	" 27,	Asa F. Lawrence.
Deane, Harrison G. et al.	Newton,	" 15,	Asa F. Lawrence.
Dearborn, Edward	Amesbury,	" 11,	N. W. Harmon.
Dexter, Alvan et al.	Boston,	" 4,	John P. Putnam.
Dexter, John B. et al.	Boston,	" 4,	John P. Putnam.
Dobson, Isaac F.	Boston,	" 1,	John P. Putnam.
Dodge, George W.	Worcester,	" 3,	Alexander H. Bullock.
Freeman, Francis	Winchester,	" 26,	Asa F. Lawrence.
Fuller, Joseph N.	Deerfield,	" 6,	David Aiken.
Gay, Caleb	Walpole,	" 22,	Samuel B. Noyes.
Gerrish, Samuel	Cambridge,	" 13,	Asa F. Lawrence.
Goddard, Salmon	Royalston,	" 3,	C. H. B. Snow.
Hixon, Timothy W.	Boston,	" 4,	John P. Putnam.
Hoyt, William L.	Lowell,	" 29,	Isaac S. Morse.
Johnston, Francis	Lawrence,	" 2,	N. W. Harmon.
Jordan, Stephen D.	New Bedford,	" 19,	E. P. Hathaway.
Kingman, Cyrus B.	North Bridgewater,	" 8,	Welcome Young.
Locke, Oliver A.	Dorchester,	" 18,	John M. Williams.
Moody, Henry L.	Newbury,	" 3,	N. W. Harmon.
Nason, Justain et al.	Lowell,	" 29,	Isaac S. Morse.
Pearson, Joseph L.	Lawrence,	" 18,	N. W. Harmon.
Pomfret, James E.	Haverhill,	April 12,	N. W. Harmon.
Pratt, Chandler M. et al.	Grafton,	May 30,	Alexander H. Bullock.
Putnam, Francis	Salem,	" 4,	N. W. Harmon.
Quimby, Enock R.	Lynn,	" 26,	John G. King.
Richardson, Joseph P.	Woburn,	" 3,	Asa F. Lawrence.
Russell, Levi H.	Dedham,	June 1,	Samuel B. Noyes.
Saurin, Thomas J.	Somerville,	May 8,	Asa F. Lawrence.
Smith, Asa F. et al.	Grafton,	" 30,	Alexander H. Bullock.
Sprague, Henry E.	Lowell,	" 8,	Isaac S. Morse.
Sweetser, Moses	Newburyport,	" 18,	N. W. Harmon.
Tay, Francis S.	Malden,	" 22,	Josiah Rutter.
Wellman, Sumner	Brighton,	" 16,	Josiah Rutter.
Wilkins, Rufus	Marlborough,	" 13,	Asa F. Lawrence.

THE
MONTHLY LAW REPORTER.

AUGUST, 1854.

THE CASE OF ANTHONY BURNS.

ON the 24th day of May, 1854, Edward G. Loring, Esq., a Commissioner of the United States Circuit Court for the District of Massachusetts, issued his warrant to the Marshal, requiring him to apprehend one Anthony Burns, charged with being a fugitive from labor and service which he owed to one Charles F. Suttle of Virginia, by the laws of that State. This warrant was issued on the petition of Suttle, the claimant. On the same evening a man was arrested, alleged to be the said Burns, at the time at work in a shop in Brattle street, and was, on the next day, brought before the Commissioner, holding his court in the Court Room of the United States Circuit Court.

Seth J. Thomas and *Edward G. Parker*, Esquires, appeared as counsel for the claimant.

Mr. Parker opened the case by reading the complaint, the warrant and return. He then put into the case a transcript of the record of the Circuit Court of the County of Alexandria, in the State of Virginia, which was as follows:

"In Alexandria Circuit Court, May 16th, 1854.

"On the application of Charles F. Suttle, who this day appeared in court, and made satisfactory proof to the court that Anthony Burns was held to service and labor by him, the said Suttle, in the State of Virginia, and said service and labor were due to him, the said Suttle, from the said Anthony, and that the said Anthony has escaped from the State aforesaid, and that the said service and labor are due him, the said Suttle, the master of the said Anthony, and having further proved to the satisfaction of the

STATE OF VIRGINIA, }
County of Alexandria. } to wit:

**Circuit Court,
Alexandria Co.
Va.**

STATE OF VIRGINIA, } to wit:
County of Alexandria.

JOHN W. TYLER."

Richard H. Dana, Jr., Esq., addressed the Commissioner as *amicus curiæ*, and suggested that the hearing ought not to go on without counsel for the prisoner. He stated that the prisoner was evidently in a state of alarm and stupefaction, and not in a condition to determine whether he would make a defence or not, and whether he would have counsel, or what course he would pursue.

Mr. Parker opposed the motion, on the ground that the prisoner had given no indication of a desire to make a defence, and that a delay would be attended with great inconvenience, and that the only object of it apparently was to endeavor to induce the defendant in the meantime to resist the just claim he was then ready to acknowledge. If it were suggested that the defendant was in an insane state of mind and would be likely to recover soon, he should not object.

Mr. Dana and Charles M. Ellis, Esq., replied. The Commissioner called the prisoner to him, stated to him that he had a right to a defence and could have counsel, if he desired it; and asked him if he wished for time to consider the matter. The prisoner seemed distracted and uncertain, and at last said that he would prefer time. The Commissioner then adjourned the court until Saturday morning.

Saturday, May 27th. At the opening of the court, Mr. Dana and Mr. Ellis appeared as counsel for the prisoner, and moved for a further delay, on the ground that they had not been able to see the prisoner until the evening before, they having declined to confer with him until he had made up his mind to defend the case, and no one else having been permitted to see him until late in the day before.

This motion was resisted by the claimant's counsel, on the ground that the counsel for the defendant did not declare that he had any defence in point of fact to make. It was, in the practice of courts, an indispensable condition to continuance or postponement that the party making the application should say that he has, or at least that he believes he has, a defence to make. Not only had the counsel for the defendant not brought this case within that well-settled rule, but it was apparent, from what had passed, that they knew the defendant had no substantial ground of defence. It was not suggested that they could adduce evidence to control what was already in the case, or that they had any evidence to offer. Moreover, a postponement might lead to a renewal of the sad scene of the night previous. Besides, it should be borne in mind that this proceeding is purely preliminary, its purpose being merely extradition and not a final determination of the relations of the parties. It seemed that the Marshal had afforded every facility to Mr. Dana to see and communicate with the defendant.

Mr. Dana replied: It is true the counsel have not said

that they have any defence to offer. This is the very difficulty. They have not had time to determine what course to pursue. They have not been authorized to act as counsel until the afternoon of yesterday, and have not seen the defendant except for a few minutes last evening. Until we were regularly engaged as his counsel, we were not willing to see him, after the insinuation made yesterday that the defendant might be induced to make a defence by over persuasion, and since we have been regularly engaged and requested by the prisoner to conduct his defence, we have had no time to consult and prepare. The learned counsel gives, as a reason for hurrying the case, that this proceeding is merely preliminary. Preliminary to what? There is no subsequent legal proceeding. Mr. Clay's bill made this proceeding preliminary to the rendition of the alleged slave into the District Court of the District from which he escaped, there to implead for his freedom, if he wished and could. But that bill was rejected. This law provides nothing to follow the certificate. The claimant takes the man and carries him where he will, and there is nothing provided by the law to follow. He may take him to the nearest block and sell him, or to the West Indies or Brazil, and no legal power can prevent him. This process is called extradition. Extradition is the delivery up by one sovereign to another of an alleged criminal, to be dealt with according to public law, on the faith of the known jurisprudence of both countries, and if the person delivered up is not legally proceeded with, it is a *casus belli*. But here a man is delivered to a private man as private property, to do with him according to his private will, for no public purpose. It has not one feature of extradition. The fact that a man is claimed to be delivered up bound, to the absolute will of a private man, makes out the strongest possible case for delay.

A suit on a note of hand for twenty-five dollars could not be tried except after two weeks' notice, and several days more for filing pleas or answers; and here a day's delay is objected to in a case which practically decides the freedom of a man forever.

The Commissioner thought the request not an unreasonable one, looking to the rights of the parties, and therefore granted a delay until Monday morning at 11 o'clock.

Monday, May 29th. — Mr. Parker asked if it was necessary to go over the evidence already presented.

The Commissioner replied that he did not consider it necessary.

Mr. Dana urged that the previous examination was when the prisoner had no counsel, and that the examination should now commence as though the arrest had just been made, he having no notes of the testimony previously given.

The Commissioner directed the complaint to be read, and the evidence repeated so far as was necessary to give the defendant an opportunity for a full cross-examination.

The complaint was then read by Mr. Parker.

He then called *William Brent* as a witness, who testified that he was a merchant of Richmond, Va.; was acquainted with Colonel Charles F. Suttle, and had been for a long time; knew Anthony Burns; the black man in court was the same — the prisoner at the bar; he knew Burns in Stafford county, and bore the relation of a slave to a master, being hired out by Suttle; had hired him himself in 1846, '47, and '48, or '47, '48, and '49, and gave a bond to Colonel Suttle for his return, and knew of his being hired out since that time; hired him out last year and the present year, as agent for Colonel Suttle, in Richmond; the wages went to Colonel Suttle; knew him as a slave for twelve or fifteen years; last year, in March, was hired in Richmond by a Mr. Millspaugh, Mr. Suttle receiving the wages; the first letting of Burns by Suttle, to his knowledge, was the year previous to his hiring him himself; when not let out he lived with Colonel Suttle; previous to his being hired, he was a boy, not capable of doing anything; there was no other Anthony Burns about the places resorted to by Suttle; he had a scar upon his right cheek and a cut across his right hand; there were no other marks upon him that he knew; he is about six feet high; I was born within three miles of Colonel Suttle; knew him ever since he could recollect; knew all his family; last saw Burns the Sunday previous to his absence — the 20th of March; he was missing on the 24th; I left Virginia on Saturday week morning; do not know how Burns left, only from his own statement.

Mr. Ellis objected to evidence of the admissions of the prisoner. This point was argued at length. The objections were placed upon the ground that the relation of a master and slave is such as to create so fair a presumption of influence, as to induce the court to rule out admissions

made to the master, while the alleged slave is in custody, on the general ground that the evidence is more likely to be deceptive, or wrongfully obtained or used, than of value to justice. The counsel for the claimant replied, that unless there is proof of some threat or promise made to the prisoner, admissions are always received, and that there would be no exception in the case of a slave. Mr. Parker requested the court to receive the testimony *de bene esse*, which was assented to.

Mr. Brent continued. Col. Suttle asked Burns how he got away. Burns replied that he did not run away, but that he was at work on board a vessel, and got tired and fell asleep, and that the vessel sailed without his knowledge, and took him off. On Mr. Suttle's going into the room after the arrest, the first word from Burns was, "How do you do, Master Charles?" The next thing was, "Did I ever whip you, Anthony?" The answer was, "No." The next question, "Did I ever hire you where you did not want to go?" The reply was, "No." The next question, "Did you ever ask me for money when it was not given you?" The answer was, "No." Mr. Suttle then asked, "Did I not, when you were sick, take my bed from my own house for you?" and the answer was, "Yes." He then recognized witness, (Brent) and said, "How do you do, Master William?" Col. Suttle asked him, substantially, if he was willing to go back. I understood him to say, substantially, that he was. I do not know that he said so, but I understood him to signify that. When I hired Burns, I gave my bond to Suttle, who claimed to own him. On another occasion, when Col. Suttle was desirous of making some pecuniary transactions, he gave a mortgage on his property, including this man Burns, in order to raise the money. When he sent Burns to Richmond, to be hired out, he described him as his "boy." It is customary in Virginia, to give passes to slaves, when they go about, one of which Burns had when he came to my house in Richmond.

Cross-examined. Have made no arrangement or understanding with Col. Suttle, as to any compensation for my services or expenses in coming here. Have acted as his friend. The conversation with Burns was in the room where he is kept, on the night of his arrest, and soon after it. Col. Suttle said to him, "I make no compromises with you. I make you no promises, and I make you no threats." He said nothing in the way of advising him to return.

He was with Millspaugh when he was missing. His going off was a matter between Col. Suttle and Millspaugh, on the lease. I have not stated the conversation between Col. Suttle and Burns categorically, in the same order in which it occurred, nor in the very words. I have given it substantially, and as I recollect it. I have not felt bound to put in anything of the conversation beyond what has been inquired of. The bond was handed back; its purpose had ceased.

Caleb Page sworn. Reside in Somerville; am a teamster; was present at the conversation alluded to with Burns, in the Marshal's room. Did not hear the first of the conversation, but remembered the questions relative to the giving of money, flogging, the use of the bed when sick, &c. Col. Suttle asked Anthony why he left him, or why he ran away, do not remember which; did not hear the answer, not being very near. Suttle asked him if he did not come in Captain Snow's vessel; Burns replied that he did not; he then asked what vessel he did come in, but witness did not hear the reply.

Cross-examined by Mr. Ellis. Am a teamster, in Milk street, working for various firms; own my own team; am not an officer; was asked to come and assist in arresting a man, by Mr. Butman, he saying, "You are just the man I want." I came to the court house with the prisoner; staid three quarters of an hour; was not here all night, that night; I walked behind at the arrest; there were four men besides myself; the room where he was put is the same in which he has been confined; I am still employed in the case by the Marshal; have no written agreement, only his word of engagement.

Mr. Thomas then offered a book, purporting to be the Revised Code of Virginia, for the purpose of proving that slavery exists in Virginia. It was objected to, on the ground that the law must be proved as a fact, by ordinary evidence. The Commissioner held that he had judicial knowledge of the laws of every State, and would inform himself by consulting books offered by counsel.

Mr. Parker then referred to the transcript of the court in Virginia, as conclusive evidence of two points, to wit: the fact of escape, and that the person named therein owed service and labor to the claimant. Mr. Dana said that the record was not yet in; that nothing was in the case except what had been put in since the case began.

anew with counsel for the defence, and that such had been the ruling of the court, and the understanding on the part of the defendant's counsel. Mr. Parker claimed that it was in. The court said the record should be considered as in the case, but subject to all objections by counsel.

A short delay was here allowed, and at 4 P. M. Mr. Ellis opened for the defence. He objected to the constitutionality of the Act of 1850, on the following grounds.

I. It does not provide a trial by jury.

II. It prohibits the resort to a Habeas Corpus, and writ *de homine replegiando*, and all other processes known to the common law.

III. It undertakes to confer judicial power on a commissioner, who is not a judge, he being neither nominated by the President and confirmed by the Senate, nor paid by a fixed salary, as required by the Constitution.

IV. It is a violation of the guaranties against unreasonable seizures, and against deprivation of liberty without due process of law.

V. Lastly, because Congress has no power to legislate on the subject of the delivery up of persons held to service and labor.

The objections to so much of the Act as makes the *ex parte* record conclusive evidence, are, —

1. That it is an attempt to confer judicial power on a State court.

2. It gives to a record a power not warranted by the Constitution.

Mr. Ellis then stated that the defendants had evidence to show, they thought, conclusively, that the prisoner was in Boston at the time that the Anthony Burns named in the record was in Richmond, Virginia, and consequently that the claimant had made a mistake in identifying the man.

EVIDENCE FOR THE DEFENCE.

Mr. Ellis called *William Jones*, (colored). I live in South Boston, and have lived there a long time. I work for the city and the Mattapan Company, and for various persons, cleaning and doing various jobs. On the 1st of last March I met the prisoner in Washington street, near the Commonwealth office. He asked me if I could find any work for him to do. We talked together for some time, and I took him home with me. We went about

together to get work. Got none of any consequence until the 4th, when we went to work for the Mattapan Co., in South Boston. He was to wash the windows, and I agreed to give him eight cents a window. When we got through I gave him one dollar and fifty cents, and he thought it was not enough, and went to see the clerk of the company about it. I have a memorandum book on which is put down the day he came to live with me, March 1st, and the day we went to work for the Mattapan Co., March 4th. I do not write; Mr. Russell wrote it for me. [The book is handed to the defendant's counsel.]

Cross-examined by Mr. Thomas. Never saw Burns before I saw him on Washington street; he spoke to me first; don't recollect the day of the week; about the first of the week; I saw him just below the Commonwealth office; he was alone; it was between eleven and twelve o'clock; he had on lightish pants; can't describe his dress more particularly, because it wasn't my business to examine his dress; he had on a lightish coat and cap; he asked me if I knew of any one that wanted a man to work in a store; I said, What can you do? he said he could do most anything; I took him from there to Mr. Russell's shop, and went from there to Mr. Favor's shop; Russell keeps in the next street to Water street; don't know his Christian name; he keeps a boot black shop; stayed there five minutes; went from there to Mr. Favor's in Lincoln street, and stayed there three quarters of an hour; then to an apothecary shop under the United States Hotel; I went there to fool; I fetched up there; I don't know what Burns went for; I stayed there twenty-five or thirty minutes; I next went to Mr. Maddox's in Essex street; he keeps a clothing store; arrived there about two o'clock; had nothing else to do but walk round the city; after leaving Maddox's came down Washington street; went into Mr. Bell's, dancing master; he went there with me; didn't remain there half a second, for he wan't in; then went down Washington to Kneeland street, and then went home at South Boston; Burns went with me; it was night when we arrived home; I had not dined; I eat but one meal a day, and have no particular hour for that; it was a little cold; there might have been snow on the ground, but I don't recollect; don't recollect whether it snowed or rained; it might have rained twenty times and I not notice it; he stayed with me that night, the next

night, and the next, and the next; I never expected to see this that I see here now; the next morning, after he went home with me, he came to the City Hall to see Mr. Gould; don't know his Christian name; I went to see if there were any orders; it was between ten and eleven o'clock; went to get employment for myself; next went to School street; then went out on the neck to take a walk, and see what I could see; didn't call on any body but Mr. Gould; next day got up, washed my face and hands; went to the Mattapan works; saw Mr. Sawyer, the boss; stayed two or three hours; talked with him about the job; went home about eleven or twelve; Burns was with me all the time; went back to the Mattapan works and commenced work at one o'clock; remained there till night; Burns was with me all the time; he helped me clean the windows; next morning went back to work with me; he had no trunk; worked all day; next day cleaned windows; never keep the run of the weather, or the day of the week; after finishing my work at the Mattapan works, went to City Hall to see Mr. Gould; Burns went with me; there was no work to be done, and we went home then; on the 18th day of March went to work at City Hall; he was with me there about three times; he made fire under the boiler for me as an accommodation; he stayed with me until the 18th; I left him here on the morning of 18th; never put eyes on him again until Sunday morning, when I saw him looking out of the window of the Court House; I stood on the opposite side; his head was out of the window; it was near twelve o'clock; had been before to the Revere House and called on Col. Suttle; went on the Friday previous to see Suttle; it was Thursday or Friday; saw a good many men besides Suttle; didn't know any of them; had never seen Colonel Suttle any where else; might have seen him in Virginia, but I didn't know him; first heard of the arrest of Burns on Thursday; came into the Police Court and the Municipal Court; I heard there was a man arrested, and I walked round here and I didn't believe; one of the officers told me of the arrest; I stayed at the Court House all night Friday night, me and a watchman together, protecting the city property; I employed myself; didn't come into the court Saturday because I couldn't get in; nobody spoke to me about being a witness here; I came here because I saw this man looking out of the window; have had no conversation with any body about this matter until

yesterday; I mentioned it to many; came here this morning with Mr. Lawton; went from this court house at half past seven o'clock Saturday night, and came back as the bells were ringing for church, Sunday morning, and went to the Revere House; was at the meeting in Faneuil Hall, and came from there when the meeting broke up; stood in Court street until the mob left the square, and then went up the square to protect the city property; first heard him called Anthony Burns on Thursday; a man read it from the newspaper; I called him John and Jack, or any short name that came handy; have not spoken to Mr. Carlton, an officer, since Friday or Saturday; spoke to Mr. Carlton in the Marshal's office; might have passed some words with him; didn't tell him that Burns belonged to Col. Suttle; applied to the Marshal for a permit to see Burns, and he said he wouldn't let his master see him; I didn't say if I saw him I would advise him to go back.

George H. Drew sworn. Was book-keeper at the Mattapan works until 18th of this month. Know Jones well. He was employed at the works in the early part of March, washing windows, white-washing, &c. I find by my cash book that I paid Jones one dollar and fifty cents for cleaning windows on the 4th day of March. This is the first payment. Afterwards I paid him at intervals until the 28th, when I had a final settlement. The work had been done several days before the final payment. The first work he did was cleaning windows. After that he white-washed. Jones had two or three colored men working with him. One of them was the prisoner. Have not seen the prisoner from the time he worked there till I saw him yesterday. When I came in here yesterday I recognized him. He seemed to recognize me. He followed me with his eyes round the room. After I had settled with Jones, this man came and wished to know how much I paid Jones for the windows, and I told him. I have no doubt of the identity of the man.

Cross-examined by Mr. Parker. I was sent for yesterday, and told that I was wanted as a witness here. I came and was asked to go in and look at the prisoner. I did so, and recognized him. I never noticed the scar on his cheek. My desk was so placed that his face was turned the other way from me, as it is now. I never noticed the wound on his hand.

James F. Whittemore. Member of the Common Coun-

cil. Reside at South Boston, and was a director of the Mattapan works. Went to the West in February, and returned home on the 8th of March. Either on that day or the next, I went to the works as usual. That is my place of business. Saw the prisoner there cleaning windows with Jones. I then noticed the scar on his cheek, and that something was the matter with his right hand. I have no doubt of the man.

Cross-examined by Mr. Parker. Know it was the 8th when I returned, because I left Philadelphia on the 6th. I heard yesterday that there was evidence that the prisoner was the man that Jones had employed at the works to wash windows. I was certain that I should know that man if I saw him, so I came here to see if it was right. I recognized Burns at once. I stated this to Mr. Putnam. The conversation I alluded to was held at the office of Mr. Ellis, this morning. I went to the office with Mr. Putnam. Did not know what business he went there on. It was rumored that an attempt would be made to prove that Burns was here before the middle of March, and I supposed Mr. Putnam went in there in connection with that business. Can't say from whom I heard this rumor. I was served with a notice this morning when in Mr. Ellis's office.

Re-examined by Mr. Dana. I am a lieutenant of the Pulaski Guards. I am not under the imputation of being either an abolitionist or a free soiler. Am a hunker whig.

Stephen Maddox, (colored). Keep a clothing shop at 72 Essex street; saw the prisoner at my shop one day in the early part of March, with Jones; it was about noon; he was there about five minutes; Jones came in to know if I had work for the man; my out-door work is cleaning windows, &c., and does not begin until May; remember telling him that I should have no out-door work for him for two months, the first of May; that is the way that I fix the time; I particularly noticed the marks on Burns's left cheek; I recognized him to-day without his being pointed out to me.

Cross-examined by Mr. Parker. Have been at 72 Essex street since August last; before that was in Washington street, and carried on the same business; was not born here; did not ask his name when he called on me; Mr. Jones did not mention his name; the next time I saw Jones I said nothing to him about Burns; I think Burns had on lightish clothes when he called with Jones; don't know whether he had an overcoat on; can't say what I

did the rest of the day ; Mr. Jones said I was summoned to be here, on account of that man who came to my shop ; I told him I would be here at nine o'clock ; came at eight o'clock ; came in with Jones between nine and ten ; have had no conversation with Mr. Jones about Burns, until he told me that I was summoned ; talked about it two or three minutes ; have not talked about it with Jones to-day ; I spoke to Mr. Ellis about it this morning, in his office ; Jones went there with me ; I fix the time of Burns being in my shop by the fact that I told Mr. Jones that my busy time did not commence for two months, which would be the first of May ; I mean by my outside work, cleaning windows, shaking carpets, &c. ; came past the Court House on Friday night, after the adjournment of the Faneuil Hall meeting ; stayed about twenty minutes, then went home ; did not see Jones that night ; was about here half an hour on Saturday ; was not here on Sunday.

William C. Culver sworn. Am a blacksmith, and was employed at the Mattapan works in March. Jones and his man worked there before we changed our morning hours. The change was made April 1st.

John Favor. Am a carpenter, and reside in Boston. Jones was in my shop in March ; had a colored man with him. He came to get employment for the man. The prisoner is the man. I have no doubt of it. Cannot fix the time definitely, but think it was between the 1st and 5th of March.

H. N. Gilman. Did teaming for the Mattapan Co. in March. Remember the man Jones had with him. Remember a scar on his face. Knew I could identify the man. The prisoner is the man. It was early in March, near the pay day, which was March 1st.

Cross-examined. Perhaps saw him half an hour in all.

Rufus A. Putnam sworn. Machinist, employed by the Mattapan Co. Remember Jones and a colored man working there in March. I took my job there in the early part of March, before the 10th, and Jones was there when I began. Remember it was before the change of hours, which was 1st April.

Cross-examined by Mr. Parker. Have memoranda which enable me to fix the date as before 10th March. It was rather cold weather when the windows were cleaned. Am sure I began before March 6th, and that it may have

been before the 3d. Have never seen him since he was at South Boston till I saw him here. I went to Mr. Ellis's office this morning by request of Mr. Drew. I went with Whittemore. Can't say whether I asked him to go with me. Was never in there before.

Horace W. Brown. Police officer. I was at work at the Mattapan works as a carpenter in February and March. I left work on or about the 20th of March. I received \$1.50 a day, and was paid up to March, and then when my work was done, I was paid \$29.50, which is about twenty days' work, and would bring my work up to about the 20th March. I altered three rooms, and then worked on a new building. Worked on the new building about ten days before I left the place. The windows were cleaned in the old building. While I was at work on the old building, Jones and his man were cleaning the windows. There were no windows to clean in the new building. The prisoner is the man. There is no doubt at all about him.

Cross-examined. My attention was first called to the matter this afternoon. I heard a rumor that this was the man who cleaned the windows with Jones, and came here of my own accord to see if it was so. The prisoner was cleaning windows in my room, and I asked him to clean a particular window. Remember the scar on his face.

THE CLAIMANT CALLED, IN REBUTTAL,

Cyrus Gould. I have charge of the City Hall, was about it all the month of March. Jones worked on the 10th March for me, and on the 16th and 17th he worked on the City Building, which my brother has charge of. Did not see Burns there with Jones, at all. He had no man working with him on the Hall, but one or two colored women. I employed and paid him.

The court then adjourned to nine o'clock, Wednesday morning, May 31st.

Wednesday, May 31st. *Erastus B. Gould* called. Have charge of the City Building. Know Jones. Employed him to work for me on the 26th March. Employed him at no other time in March. He had two women working with him, but no man. Never saw Burns about the City Building.

Cross-examined. I am there only mornings and nights.

Benjamin True. Am one of the men employed by the

Marshal to guard the prisoner. Have conversed with him a day or two.

[Evidence of conversations objected to generally, and because it was not rebutting. The court said it had considered the question since it was argued, and had come to the conclusion that the admissions by the prisoner, made either to Col. Suttle or any one else during his confinement, were competent testimony.]

Mr. Dana examines him to see if there was not actual duress.

True resumed. The conversation was in the room where he is kept; it was on Friday and Saturday; there are always six men in the room; the door is locked; at first he seemed a little intimidated; never told him it would be better for him to go back peaceably; or that it would be better for him if he made no trouble; the keepers were not armed until the second night, at the time of the attempt to rescue.

The Commissioner ruled in the evidence.

True resumed. I conversed with Burns about the length of time he had been here. He said he had been here about two months, perhaps a little less; nothing else was said about the time he had been here. He said he had been in Richmond, Va., before that; I never threatened him or held out any promises to him; we endeavored to treat him well; gave him newspapers, oranges, oyster stews and candy when he wished them; he can read and write.

This closed the evidence.

R. H. Dana, Jr., for the defence, spoke for four hours. He made the following points.

As to the identity. After enumerating several striking instances of mistakes in identity, and referring to the fact of two discovered mistakes in persons returned as slaves by commissioners, he examined and contrasted the evidence on each side in this case. The evidence for the defence came from numerous witnesses, that for the claimant from one, and he testifying under the strongest bias. The defendant's witnesses were mostly strangers and unbiassed. On a question of identity, numbers are of importance, because each person has a different point of sight, different habits of observation and memory. They are separate rays, from distinct sources, all settling on one point. The evidence, too, was in great detail, which is inconsistent

with the idea of its being concocted. Many of the witnesses could not be suspected of connivance. Mr. Brent adhered to his date, March 20th, and the claimant's case was distinctly and irrevocably put upon the ground that the man he claims was in Richmond on the 20th March.

On the point of identity, all doubts must be removed. If there was a reasonable doubt, an intelligent, abiding misgiving of the judicial mind, the prisoner must be discharged.

As to the admissions, he argued the general principle that the relation of master and slave was such as to authorize the court to lay down a general rule that the admissions made to an alleged master, by a man in custody, on a trial for freedom, were not competent evidence for the claimant; if this rule was not accepted, then that there was evidence enough of undue influence, promises and threats in this case.

On this point, he said: "The only evidence, in this conflict, which can aid your Honor's judgment, is the admission of the prisoner, made to Col. Suttle, on the night of the arrest. He was arrested suddenly, on a false pretence, coming home at nightfall from his day's work, and hurried into custody, among strange men, in a strange place, and suddenly, whether claimed rightfully or claimed wrongfully, he saw he was claimed as a slave, and his condition burst upon him in a flood of terror. This was at night. You saw him, sir, the next day, and you remember the state he was then in. You remember his stupefied and terrified condition. You remember his hesitation, his timid glance about the room, even when looking in the mild face of justice. How little your kind words reassured him. Sir, the day after the arrest you felt obliged to put off his trial two days, because he was not in a condition to know or decide what he would do.

Now, you are called upon to decide his fate upon evidence of a few words, merely mumblings of assent or dissent, perhaps mere movings of the head, one way or the other, construed by Mr. Brent into assent or dissent, to questions put to him by Col. Suttle, put to him at the moment the terrors of his situation first broke upon him. That you have them correctly, you rely on the recollections of one man, and that man testifying under incalculable bias. If he has misapprehended or misrepresented the prisoner in one respect, he may in another. In one respect

we know he has. He testified that when Col. Suttle asked him if he wished to go back, he understood him to say he did. This we know is not true. The prisoner has denied it in every form. If he was willing to go back, why did they not send to Coffin Pitts's shop, and tell the prisoner that Col. Suttle was at the Revere House, and would give him an opportunity to return? No, sir, they lurked about the thievish corners of the streets, and measured his height and his scars to see if he answered to the record, and seized him by fraud and violence, six men of them, and hurried him into bonds and imprisonment. Some one hundred hired men, armed, keep him in this room, where once Story sat in judgment — now a slave pen. One hundred and fifty bayonets of the regulars, and fifteen hundred of the militia keep him without. If all that we see about us is necessary to keep a man who is willing to go back, pray sir, what shall we see when they shall get hold of a man who is not willing to go back?

I regret extremely that you did not, sir, adopt the rule that in the trial of an issue of freedom, the admissions of the alleged slave, made to the man who claims him, while in custody, during the trial, should not be received. That ruling would have been sustained by reason, and humanity, and precedent. Failing that, I hoped the facts of this case would show enough of intimidation to throw out the evidence. At least, they show enough to deprive it of all weight. I have reminded you of his condition the next morning. What must it have been then? One of his keepers, True, says he was that night a good deal intimidated. Who intimidated him? Do you recollect the significant words of Col. Suttle, "I make no compromises with you! I make you no promises and no threats." This means, "It is according to the course you take now that you will be treated when I get you back. If you put me to no trouble and expense, it will be few stripes or no stripes. If you do, it will be many stripes." Was ever man more distinctly told it would be better for him if he acquiesced in every thing, yielded every thing, assented to every thing? That is what those words, uttered in a tone, no doubt, that he well understood, conveyed to his mind. But I am wasting words. I know that your Honor will give little or no weight to testimony so liable, at all times,

to misconception, misrecollection, perversion, and, in this case, so cruel to use against such a person under such circumstances."

He begged the court to draw no unfavorable inference from the fact that the prisoner did not give evidence of his prior life and condition. Most colored people here, are either fugitives themselves, or have a wife, sister or child, who would be traced through them. Is it not enough if he defends himself against this claim? Must he hold up himself, and all he has on earth, to the perils of every other? If he is not the man Mr. Brent saw in Richmond on the 20th of March, what concern is it of ours who else he be? If he is not the late slave of Mr. Millspaugh, what concern is it of ours whose slave he is, or has been, or he fears may be claimed to be? To escape this evil, must he betray himself to the peril of perhaps a greater and more dreaded danger from which he may have fled for his life? Sufficient unto the day is the evil thereof.

The claimant, after identifying his man beyond a reasonable doubt, must make out two points — 1. The servitude; 2. The escape. On the point of servitude he had offered one witness, Mr. Brent. Mr. Brent's evidence showed, affirmatively and conclusively, that Col. Suttle was not entitled to the certificate. The alleged slave had been leased, by a valid, written lease, accompanied by delivery and possession, to Mr. Millspaugh, of Richmond. The proceedings under this statute are sustained as constitutional solely on the ground that they relate simply to the temporary custody and possession, and do not affect the general property or title at all. Slaves are chattels by the law of Virginia, and the lessee of the chattel, in possession, has the sole right of custody and control, even against the general owner. In case of interpleader here between Millspaugh and Suttle, the certificate would go to Millspaugh. It also appeared that the slave had been mortgaged, and there is no evidence that the mortgage was ever cancelled; so that the only right Col. Suttle has, is a mortgaged reversion.

On the point of escape, the evidence of Mr. Brent showed affirmatively that there was no escape. He said only that Burns was "missing" from Richmond. Mr. Millspaugh, from whose custody he was missing, was neither a claimant nor a witness. To constitute an

"escape," Burns must have gone off against the will of Millspaugh, and by his own voluntary act. *Aves's case*, 19 Pick. 193; *Sims's case*, 7 Cush. 285. The only evidence throwing light upon the nature of his absence, was Mr. Brent's to his admission, (and if part of the admission goes in the whole must go in,) who says he told Col. Suttle that he came only by accident, having fallen asleep in the vessel. This may not be true, but it binds the claimant.

On the oral evidence, then, the claimant himself proves affirmatively that the prisoner did not escape, and that if he did, the right to the certificate is not in the claimant. To rebut his own case, and establish conclusively the contrary of the proof, he relies on the record produced from Virginia

Mr. Dana admitted that, by the Act of 1850, the record, if received, and allowed its full statute weight, was conclusive on the points of title and escape, leaving open only the point of identity. But he contended,

1. Sections 6 and 10 of the Act of 1850 provide for distinct proceedings, before different tribunals, ending in separate forms of certificate. Section 6 provides for proof of title and escape, as well as identity, to be made before the Commissioner here, on trial in presence of both parties, upon which his judgment is to be satisfied. Section 10 provides for proof on these points to be made in Virginia, *ex parte*, on which the judgment of the court there is to be satisfied, and only provides for the production of the record of that judgment, which, being a *res adjudicata*, is made conclusive here. The claimant has chosen to proceed under section 6, and having disproved his case, cannot unite the two proceedings in one.

2. The phrase in the statute, that the record shall be "conclusive," only means that it shall not be contradicted by proof on the other side. It cannot mean that a claimant may prove himself not entitled to a certificate, and yet claim it by force of the *ex parte* record. If this were so, Col. Suttle might come into court and declare that in point of fact he is not the owner, and in point of fact the man did not escape, and yet oblige the court to deliver the man to him by force of an earlier *ex parte* record.

3. The instrument produced is not a record. It is only a recital that a record has been made, the record itself not appearing.

4. It is insufficient, because it does not describe the man with "convenient certainty." The prisoner is a full-blooded negro. The record does not say whether he is a negro, white, Indian or mulatto.

On the constitutional question, Mr. Dana said he should offer the propositions in the same form in which they were cast by Mr. Rantoul in the *Sims' case*, and not argue them at all, putting them forward only as a continued protest.

I. That the power which the Commissioner is called upon in this procedure to exercise, is a judicial power, and one that, if otherwise lawful, can be exercised only by a judge of the United States Court, duly appointed, and that the Commissioner is not such a judge.

II. That the procedure in a suit between the claimant and captive, involving an alleged right of property on the one hand, and the right of personal liberty on the other, and that either party, therefore, is entitled to trial by jury; and that the law which purports to authorize a delivery of the captive to the claimant, denying him the privilege of such trial, and which he here claims under judicial process, is unconstitutional and void.

III. That the transcript of testimony taken before the magistrates of a State Court in Georgia, and of the judgment thereupon by such magistrates, is incompetent evidence, Congress having no power to confer upon State courts or magistrates judicial authority to determine, conclusively or otherwise, upon the effect of evidence to be used in a suit pending or to be tried in another State, or before another tribunal.

IV. That such evidence is also incompetent; because the captive was not represented at the taking thereof, and had no opportunity for cross-examination.

V. That the statute under which the process is instituted, is unconstitutional and void, as not within the powers granted to Congress by the Constitution, and because it is opposed to the express provisions thereof.

Mr. *Thomas* closed for the claimant. He stated the nature of the case. The claimant alleged that the defendant owed him service and labor in the State of Virginia, and that he escaped therefrom. He had come here to reclaim him. His purpose was to take the man back to the State from whence he fled, and only that. The purpose of this examination was to procure from the Commissioner a cer-

tificate, under his hand and seal, that he had a right to transport him back. The certificate conferred no right — clothed the claimant with no power that he had not without it ; but was simply a means to facilitate removal, and so designed. It was made conclusive against all obstruction or interference. It certified the claimant's right to take the person back to Virginia, but no where else ; and it had no effect upon his rights when he got back. Its purpose was then accomplished.

As a condition to the granting of this certificate, the claimant was bound to prove these two facts to the satisfaction of the Commissioner. The statute prescribes the modes of proof. It might be done by deposition or affidavit, taken and certified by a judge or commissioner, or by parol testimony in the ordinary way, or the claimant might go before a court of record, in the State whence the escape was made, and make satisfactory proof to such court that the person described by him owed him service and labor, and escaped ; and if such court made a record of the facts so proved, and furnished to the claimant a transcript of such record, duly certified, and the claimant produced it before this court, the statute says it shall be competent evidence and conclusive in this examination of the facts therein recited. The claimant might pursue either or all these modes of proof as he thought fit ; there was nothing inconsistent in either with the others. The claimant in this case produced such a record. It was the first piece of testimony put in by him ; and it was conclusive, he maintained, of the two material facts. The only question remaining was that of identity. Was the defendant the person described in the record ?

Mr. Thomas contended that this was proved in various ways. 1. The defendant answered to the description in the record. It would be difficult to find another person among the whole colored population of Boston who answered that description so well. The concurrence of all these marks in another would be extraordinary indeed. 2. There was the testimony of Brent, who had known him from a boy, for whom he had worked, in whose house he had lived, who had hired him out to others, who had been accustomed to see him almost daily, and who saw him often down to the time of his leaving. He swears positively, and from personal knowledge. 3. The admissions of the de-

fendant himself, about which there could be no mistake. Brent's credibility was not denied, and if it were, in what he said about these admissions, he was confirmed by others. He swore to the conversation on the night of the arrest, which showed conclusively that Burns knew both him and Suttle before then, and called them by name. How and where, if not in Virginia?

It was said that Brent was mistaken in the date when he last saw Burns in Virginia; and if mistaken in that, he might also be mistaken in the identity. But Mr. Thomas did not believe he was mistaken in the date, and if he were, no inference could be drawn from that that he was also mistaken in the identity. The two facts were entirely different. Dates were easily mistaken unless connected with some particular fact to lead one to take note of them; then they are remembered by the fact, and not the fact by the date. In the identity of a person whom one had known and seen frequently from boyhood to manhood, especially one so scarred and marked as this man, one could not well be mistaken. Besides, the date was not material. The record mentioned no date of escape, but only the fact. The complaint, in which alone the 24th was named, was of no consequence in this hearing. It was simply the foundation for the warrant. The fugitive might be arrested without any warrant, and of course without any complaint. The defendant was not here tried on a charge. The testimony of Jones and Maddocks, Mr. Thomas believed to be a sheer fabrication, manufactured expressly for the occasion, and since the hearing began. Whittemore and some of the others he thought were honestly mistaken. They had never seen Burns but once, and then never expected to see him again, and took no particular notice of him. They were told he was the man before they came into court, and when they came in they made up their minds that he was. The testimony of Brent was worth far more than all these. Then there was the fact that no account was given of this man before the first of March. This fact Mr. Thomas argued at some length.

Mr. Thomas said he should submit with confidence that the claimant had proved his case in three ways, either of which would alone be sufficient to entitle him to a certificate—neither of which was inconsistent with the others—by the record, by the testimony of Brent, and by the ad-

missions. They severally show service due, and escape, and sufficiently indicate the person. As to the mortgage spoken of, the testimony was that it had been handed back, its purpose having ceased; and besides, under the record, which was conclusive, that was not open to inquiry. As to the affidavit of Millspaugh, it could be of no service in respect of identity, and if for any other purpose, the record was better. As to the constitutionality of the law which had been argued at length by the other side, he thought it sufficient to say, the statute of 1793, on this subject, had been pronounced constitutional by the highest judicial tribunal in the country; and this statute of 1850 differed from that only in respect to the conclusiveness of the record, and in affording some further facilities for removal, and had been held to be constitutional by the Supreme Court of this State, all the judges concurring, and by every judge before whom a case under it had arisen. There he was quite willing to leave it. As to the record, Congress, in this statute, had merely prescribed a rule in respect of evidence in its own courts. It had simply determined what should be competent and what the effect of such evidence in the United States tribunals. Massachusetts and other States had done the same thing in respect to papers executed by commissioners residing in foreign States. There was nothing in the statement that under the certificate Burns could be sent to Cuba or Brazil. A fugitive slave could not be sent coastwise from one slave State to another in any vessel of more than forty tons burden without an entry being first made at the custom-house. In reply to the suggestion that the certificate sent Burns into eternal bondage, Mr. Thomas said, if, when he arrived back in Virginia, the laws of that State did not sufficiently guard his rights, the fault was not ours. He would have all the rights he had before he came away. The laws of that State did, however, provide that slaves might institute suits for their freedom, and the State paid the expenses of such suits.

The court was then adjourned until Friday, June 2d, when the Commissioner delivered the following decision.

DECISION.

The issue between the parties arises under the U. S. Statute of 1850, and for the respondent it is urged that the statute is unconstitutional. Whenever this objection is made, it becomes necessary to recur to the purpose of the

statute. It purports to carry into execution the provision of the Constitution which provides for the extradition of persons held to service or labor in one State and escaping to another. It is applicable, and it is applied alike to bond and free—to the apprentice and the slave, and in reference to both, its purpose, provisions and processes are the same.

The arrest of the fugitive is a ministerial, and not a judicial act, and the nature of the act is not altered by the means employed for its accomplishment. When an officer arrests a fugitive from justice or a party accused, the officer must determine the identity, and use his discretion and information for the purpose. When an arrest is made under this statute, the means of determining the identity are prescribed by the statute; but when the means are used and the act done, it is still a ministerial act. The statute only substitutes the means it provides for the discretion of an arresting officer, and thus gives to the fugitive from service a much better protection than a fugitive from justice can claim under any law.

If extradition is the only purpose of the statute and the determination of the identity is the only purpose of these proceedings under it, it seems to me that the objection of unconstitutionality to the statute, because it does not furnish a jury trial to the fugitive, is answered; there is no provision in the Constitution requiring the identity of the person to be arrested should be determined by a jury. It has never been claimed for apprentices nor fugitives from justice, and if it does not belong to them it does not belong to the respondent.

And if extradition is a ministerial act, to substitute in its performance, for the discretion of an arresting officer, the discretion of a Commissioner instructed by testimony under oath, seems scarcely to reach to a grant of judicial power, within the meaning of the United States Constitution. And it is certain that if the power given to and used by the Commissioner of the United States Courts under the statute is unconstitutional—then so was the power given to, and used by magistrates of counties, cities, and towns, and used by the act of 1793. These all were Commissioners of the United States—the powers they used under the statute were not derived from the laws of their respective States, but from the statute of the United States. They were

commissioned by that and that alone. They were commissioned by the class instead of individually and by name, and in this respect the only difference that I can see between the acts of 1793 and 1850 is, that the latter reduced the number of appointees, and confined the appointment to those who by their professional standing should be competent to the performance of their duties, and who bring to them the certificates of the highest judicial tribunals of the land.

It is said the statute is unconstitutional, because it gives to the record of the Court of Virginia an effect beyond its constitutional effect. The first section of the fourth article of the Constitution is directory only on the State power and as to the State courts, and does not seek to limit the control of Congress over the tribunals of the United States or the proceedings therein. Then in that article the term "records and judicial proceedings" refers to such *inter partes*, and of necessity can have no application to proceedings avowedly *ex parte*. Then if the first section includes this record, it expressly declares as to "records and judicial proceedings," that Congress shall prescribe "the effect thereof," and this express power would seem to be precisely the power that Congress has used in the statute of 1850.

Other constitutional objections have been urged here, which have been adjudged and readjudged by the courts of the United States, and of many of the States, and the decisions of these tribunals absolve me from considering the same questions further than to apply to them the determination of the Supreme Court of this State in *Sims's case*, 7 Cushing, 309, that they "are settled by a course of legal decisions which we are bound to respect, and which we regard as binding and conclusive on the court."

But a special objection has been raised to the record that it describes the escape as *from* the State of Virginia, and omits to describe it as *into another State* in the words and substance of the Constitution. But in this the record follows the 10th section of the statute of 1850, and the context of the section confines its action to cases of escape from one State, &c., into another, and is therefore in practical action and extent strictly conformable to the Constitution.

This statute has been decided to be constitutional by the

unanimous opinion of the judges of the Supreme Court of Massachusetts on the fullest argument and the maturest deliberation, and to be the law of Massachusetts as well as, and because it is, a constitutional law of the United States; and the wise words of our revered chief justice in that case, 7 Cushing, 318, may well be repeated now, and remembered always. The chief justice says :—

“Slavery was not created, established, or perpetuated by the Constitution; it existed before; it would have existed if the Constitution had not been made. The framers of the Constitution could not abrogate slavery, or the rights claimed under it. They took it as they found it, and regulated it to a limited extent. The Constitution, therefore, is not responsible for the origin or continuance of slavery—the provision it contains was the best adjustment which could be made of conflicting rights and claims, and was absolutely necessary to effect what may now be considered as the general pacification, by which harmony and peace should take the place of violence and war. These were the circumstances, and this the spirit in which the Constitution was made—the regulation of slavery so far as to prohibit States by law from harboring fugitive slaves was an essential element in its formation, and the Union intended to be established by it was essentially necessary to the peace, happiness, and highest prosperity of all the States. In this spirit and with these views steadily in prospect, it seems to be the duty of all judges and magistrates to expound and apply these provisions in the constitution and laws of the United States; and in this spirit it behooves all persons, bound to obey the laws of the United States, to consider and regard them.”

It is said that the statute, if constitutional, is wicked and cruel. The like charges were brought against the Act of 1793; and C. J. Parker, of Massachusetts, made the answer which C. J. Shaw cites and approves, viz. :—

“Whether the statute is a harsh one or not, it is not for us to determine.”

It is said that the statute is so cruel and wicked that it should not be executed by good men. Then into what hands shall its administration fall, and in its administration what is to be the protection of the unfortunate men who are brought within its operation? Will those who call the statute merciless commit it to a merciless judge?

If the statute involves that right, which for us makes life sweet, and the want of which makes life a misfortune, shall its administration be confined to those who are reckless of that right in others, or ignorant or careless of the means given for its legal defence, or dishonest in their use? If any men wish this, they are more cruel and wicked than the statute, for they would strip from the fugitive the best security and every alleviation the statute leaves him.

I think the statute is constitutional, as it remains for me now to apply it to the facts of the case.

The facts to be proved by the claimant are three:—

1. That Anthony Burns owed him service in Virginia.
2. That Anthony Burns escaped from that service.

These facts he has proved by the record which the statute, sec. 10, declares “shall be held and be taken to be full and *conclusive* evidence of the fact of escape, and that the service or labor of the person escaping is due to the party in such record mentioned.”

Thus these two facts are removed entirely and absolutely from my jurisdiction, and I am entirely and absolutely precluded from applying evidence to them. If, therefore, there is in the case evidence capable of such application, I cannot make it.

The third fact is the identity of the party before me with the Anthony Burns mentioned in the record.

This identity is the only question I have a right to consider. To this, and to this alone, I am to apply the evidence; and the question whether the respondent was in Virginia or Massachusetts at a certain time, is material only as it is evidence on the point of identity. So the parties have used it, and the testimony of the complaint being that the Anthony Burns of the record was in Virginia on the 19th of March last, the evidence of the respondent has been offered to show that he was in Massachusetts on or about the first of March last, and thereafter till now.

The testimony of the claimant is from a single witness, and he standing in circumstances which would necessarily bias the fairest mind—but other imputation than this has not been offered against him, and from anything that has appeared before me, cannot be. His means of knowledge are personal, direct, and qualify him to testify confidently, and he has done so.

The testimony on the part of the respondent is from many witnesses whose integrity is admitted, and to whom no imputation of bias can be attached by the evidence in the case, and whose means of knowledge are personal and direct, but in my opinion less full and complete than that of Mr. Brent.

Then between the testimony of the claimant and respondent there is a conflict, complete and irreconcilable. The question of identity on such a conflict of testimony is not unprecedented nor uncommon in judicial proceedings, and the trial of Dr. Webster furnished a memorable instance of it.

The question now is, whether there is other evidence in this case which will determine this conflict. In every case of disputed identity there is one person always whose knowledge is perfect and positive, and whose evidence is not within the reach of error, and that is the person whose identity is questioned, and such evidence this case affords. The evidence is of the conversation which took place between Burns and the claimant on the night of the arrest.

When the complainant entered the room where Burns was, Burns saluted him, and by his Christian name — "How do you do, Master Charles?" He saluted Mr. Brent also, and by his Christian name — How do you do, Master William?" (To the appellation "Master," I give no weight.)

Col. Suttle said, "How came you here?" Burns said an accident had happened to him — that he was working down at Roberts's, on board a vessel — got tired and went to sleep, and was carried off in the vessel.

Mr. S. Anthony, did I ever whip you?

B. No, sir.

Mr. S. Did I ever hire you out any where where you did not wish to go?

B. No, sir.

Mr. S. Have you ever asked me for money that I did not give it to you?

B. No, sir.

Mr. S. When you were sick did I not prepare you a bed in my own house, and put you upon it, and nurse you?

B. Yes, sir.

Something was said about going back. He was asked if he was willing to go back, and he said — Yes, he was.

This was the testimony of Mr. Brent. That a conversation took place was confirmed by the testimony of Caleb Page, who was present, and added the remark that Burns said he did not come in Capt. Snow's vessel. The cross-examination of Brent showed that Col. Suttle said — I make you no promises, and I make you no threats."

To me this evidence, when applied to the question of identity, confirms and establishes the testimony of Mr. Brent in its conflict with that offered on the part of the respondent, and then on the whole testimony my mind is satisfied beyond a reasonable doubt of the identity of the respondent with the Anthony Burns named in the record.

It was objected that this conversation was in the nature of admissions, and that too of a man stupefied by circumstances and fear, and these considerations would have weight had the admissions been used to establish the truth of the matters to which they referred, i. e. the usage — the giving of money — nursing, &c. ; but they were used for no such purpose, but only as evidence in reference to identity. Had they been procured by hope or fear, they would have been inadmissible ; but of that I considered there was no evidence.

On the law and facts of the case, I consider the claimant entitled to the certificate from me which he claims.

And the Commissioner accordingly gave the following certificate.

UNITED STATES OF AMERICA, }
Massachusetts District, ss. }

Whereas Charles F. Suttle of Alexandria, in the State of Virginia, merchant, hath produced and exhibited to me the transcript of a record of the Circuit Court of the County of Alexandria, in the State of Virginia, authenticated by the attestation of the clerk, and of the seal of the said courts, by which it appears, that on the tenth day of May last, the said Suttle appealed to said court, and made satisfactory proof to the same, that one Anthony Burns was held to service and labor by him, the said Suttle, in the said State of Virginia ; and that the said Anthony escaped from the State of Virginia aforesaid ; and that this said service and labor are still due to him, the said Suttle, the master of the said Anthony ; and further proved, to the satisfaction of the said court, that the said Anthony is a man of dark complexion, about six feet high, with a scar on one of his cheeks, and also a scar on the back of his right hand, and about twenty-three or four years of age ; and whereas it hath also been proved before me, on the oath of a credible witness, that the said Anthony Burns, a colored man, now in the custody of Watson Freeman, Esq., Marshal of the United States, for the District of Massachusetts aforesaid, on a warrant issued by me for his apprehension, is the same Anthony Burns mentioned and described in the aforesaid transcript of a record, and therein certified as owing service and labor to the said Charles F. Suttle, the

claimant of the said Burns is authorized to remove him, the said Burns, from the State of Massachusetts back to the State of Virginia, pursuant to the act of Congress, passed on the 18th day September, A. D. 1850, entitled "an act to amend, and supplementary to 'an act respecting fugitives from justice, and persons escaping from the service of their masters,' approved February 12th, one thousand seven hundred and ninety-three."

Given under my hand and seal at Boston, on this second day of June, in the year one thousand eight hundred and fifty-four.

(Signed)

EDWARD G. LORING, (*Seal.*)

One of the Commissioners appointed by the Circuit Court of the United States, for the First Circuit and District of Massachusetts, to take bail and affidavits in civil causes.

To this certificate was appended one by the clerk of said Circuit Court, that he was acquainted with the handwriting of E. G. Loring, whose name was subscribed to the above; and that his signature thereto was his handwriting; and that he was at the time of writing the same, a Commissioner duly appointed by said court, pursuant to the acts of Congress, in cases made and provided "for the more convenient taking of affidavits and bail in civil causes, depending in the Court of the United States." Mr. Suttle made an affidavit before an United States Commissioner, which was in part as follows:

"I have reason to believe and apprehend that said fugitive will be rescued from me before he can be taken beyond the limits of this State in which he has been arrested, and I therefore request the officer who made the arrest, to wit: Watson Freeman, Esq., United States Marshal for the said district of Massachusetts, to remove the said fugitive to said Alexandria, in said Virginia, and there to deliver him to me."

Burns was accordingly transported on Friday, the 5th of June, A. D. 1854, under the guard of a military force to the United States revenue cutter *Morris*, then lying at one of the wharves in Boston, and conveyed, under the charge of deputies appointed by the Marshal, to Alexandria, Virginia, where he was delivered to the claimant.

CHARGE OF MR. JUSTICE CURTIS

TO THE GRAND JURY OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS, DELIVERED DURING THE MAY TERM OF 1854, ON THE 7TH OF JUNE.

The following portions of Judge Curtis's charge to the Grand Jury of the Circuit Court will be read with interest, in connection with the foregoing report of the case of Anthony Burns, suggested as it is to be presumed they were by the attempt to rescue him from the custody of the Marshal.

CHARGE OF JUDGE CURTIS.

THERE is another criminal law of the United States to which I must call your attention and give you in charge. It was enacted on the 13th of April, 1790, and is in the following words :—

“If any person shall knowingly or wilfully obstruct, resist or oppose any officer of the United States in serving or attempting to serve or execute any mesne process, or warrant, or any rule or order of any of the courts of the United States, or any other legal writ or process whatever, or shall assault, beat or wound any officer, or other person duly authorized, in serving or executing any writ, rule, order, process or warrant aforesaid, such person shall, on conviction, be imprisoned not exceeding twelve months, and fined not exceeding three hundred dollars.”

You will observe, gentlemen, that this law makes no provision for a case where an officer, or other person duly authorized, is killed by those unlawfully resisting him. That is the case of murder, and is left to be tried and punished under the laws of the State within whose jurisdiction the offence is committed. Over that offence against the laws of the State of Massachusetts we have here no jurisdiction. It is to be presumed that the duly constituted authorities of the State will, in any such case, do their duty, and if the crime of murder has been committed, will prosecute and punish all who are guilty.

Our duty is limited to administering the laws of the United States; and by one of those laws, which I have read to you, to obstruct, resist, or oppose, or beat, or wound any officer of the United States, or other person duly authorized, in serving or executing any legal process whatso-

ever, is an offence against the laws of the United States, and is one of the subjects concerning which you are bound to inquire.

It is not material that the same act is an offence both against the laws of the United States and of a particular State. Under our system of government, the United States and the several States are distinct sovereignties, each having its own system of criminal law, which it administers in its own tribunals; and the criminal laws of a State can in no way affect those of the United States. The offence, therefore, of obstructing legal process of the United States is to be inquired of and treated by you as a misdemeanor, under the act of Congress which I have quoted, without any regard to the criminal laws of the State, or the nature of the crime under those laws.

This act of Congress is carefully worded, and its meaning is plain. Nevertheless, there are some terms in it, and some rules of law connected with it, which should be explained for your guidance. And first, as to the process, the execution of which is not to be obstructed.

The language of the act is very broad. It embraces every legal process whatsoever, whether issued by a Court in session, or by a judge, or magistrate, or commissioner, acting in the due administration of any law of the United States. You will probably experience no difficulty in understanding and applying this part of the law.

As to what constitutes an obstruction. It was, many years ago, decided by Mr. Justice Washington, that, to support an indictment under this law, it was not necessary to prove the accused used, or even threatened, active violence. Any obstruction to the free action of the officer, or his lawful assistants, wilfully placed in his or their way, for the purpose of thus obstructing him, or them, is sufficient. And it is clear, that, if a multitude of persons should assemble, even in a public highway, with the design to stand together and thus prevent the officer from passing freely along the way, in the execution of his precept, and the officer should thus be hindered or obstructed, this would of itself, and without any active violence, be such an obstruction as is contemplated by this law. If to this be added, use of any active violence, then the officer is not only obstructed, but he is resisted and opposed, and of course the offence is complete, for either of them is sufficient to constitute it.

If you should be satisfied that an offence against this law has been perpetrated, you will then inquire by whom. And this renders it necessary for me to instruct you concerning the kind and amount of participation which brings individuals within the compass of this law.

And first, all who are present and actually obstruct, resist, or oppose, are of course guilty. So are all who are present, leagued in the common design, and so situated as to be able in case of need to afford assistance to those actually engaged, though they do not actually obstruct, resist or oppose. If they are present for the purpose of affording assistance in obstructing, resisting or opposing the officers, and are so situated as to be able, in any event which may occur, actually to aid in the common design, though no overt act is done by them, they are still guilty under this law. The offence defined by this act is a misdemeanor; and it is a rule of law, that whatever participation in a case of felony, would render a person guilty, either as a principal in the second degree, or as an accessory before the fact, does, in a case of misdemeanor, render him guilty as a principal; in misdemeanors all are principals. And therefore, in pursuance of the same rule, not only those who are present, but those who, though absent when the offence was committed, did procure, counsel, command, or abet others to commit the offence, are indictable as principals. Such is the law, and it would seem that no just mind could doubt its propriety. If persons having influence over others use that influence to induce the commission of crime, while they themselves remain at a safe distance, that must be deemed a very imperfect system of law which allows them to escape with impunity. Such is not our law. It treats such advice as criminal, and subjects the giver of it to punishment according to the nature of the offence to which his pernicious counsel has led. If it be a case of felony, he is by the common law an accessory before the fact, and by the laws of the United States and of this State is punishable to the same extent as the principal felon. If it be a case of misdemeanor, the adviser is himself a principal offender, and is to be indicted and punished as if he himself had done the criminal act. It may be important for you to know what, in point of law, amounts to such an advising or counselling another as will be sufficient to constitute this legal element in the offence. It is laid down by high authority that though a mere tacit acquiescence, or

words, which amount to a bare permission, will not be sufficient, yet such a procurement may be, either by direct means, as by hire, counsel or command, or indirect, by evincing an express liking, approbation or assent to another's criminal design. From the nature of the case the law can prescribe only general rules on this subject. My instruction to you is, that language, addressed to persons who immediately afterwards commit an offence, actually intended by the speaker to incite those addressed to commit it, and adapted thus to incite them, is such a counselling or advising to the crime as the law contemplates, and the person so inciting others is liable to be indicted as a principal.

In the case of the *Commonwealth v. Bowen*, 13 Mass. 359, which was an indictment for counselling another to commit suicide, tried in 1816, Chief Justice Parker, instructing the jury, and speaking for the Supreme Court of Massachusetts, said : —

“The government is not bound to prove that Jewett would not have hung himself, had Bowen's counsel never reached his ear. The very act of advising to the commission of a crime is of itself unlawful. The presumption of law is that advice has the influence and effect intended by the adviser, unless it is shown to have been otherwise ; as that the counsel was received with scoff, or was manifestly rejected and ridiculed at the time it was given. It was said in the argument that Jewett's abandoned and depraved character furnishes ground to believe that he would have committed the act without such advice from Bowen. Without doubt he was a hardened and depraved wretch ; but it is in man's nature to revolt at self-destruction. When a person is predetermined upon the commission of this crime, the seasonable admonitions of a discreet and respected friend would probably tend to overthrow his determination. On the other hand, the counsel of an unprincipled wretch, stating the heroism and courage the self-murderer displays, might induce, encourage, and fix the intention, and ultimately procure the perpetration of the dreadful deed ; and if other men would be influenced by such advice, the presumption is that Jewett was so influenced. He might have been influenced by many powerful motives to destroy himself. Still the inducements might have been insufficient to procure the actual commission of the act, and one word of additional advice might have turned the scale.”

When applied, as this ruling seems to have been here applied, to a case in which the advice was nearly connected, in point of time, with the criminal act, it is, in my opinion, correct. If the advice was intended by the giver to stir or incite to a crime, if it was of such a nature as to be adapted to have this effect, and the persons incited immediately afterwards committed that crime, it is a just presumption that they were influenced by the advice or incitement to commit it. The circumstances, or direct proof, may or may not be sufficient to control this presumption; and whether they are so, can duly be determined in each case, upon all its evidence.

One other rule of law on this subject is necessary to be borne in mind. The substantive offence to which the advice or incitement applied, must have been committed; and it is for that alone the adviser or procurer is legally accountable. Thus, if one should counsel another to rescue one prisoner, and he should rescue another, unless by mistake; or if the incitement was to rescue a prisoner, and he commit a larceny, the inciter is not responsible. But it need not appear that the precise time, or place, or means advised, were used. Thus if one incite A. to murder B., but advise him to wait until B. shall be at a certain place at noon, and A. murders B. at a different place in the morning, the adviser is guilty. So if the incitement be to poison, and the murderer shoots, or stabs. So if the counsel be to beat another, and he is beaten to death, the adviser is a murderer; for having incited another to commit an unlawful act, he is responsible for all that ensues upon its execution. These illustrations are drawn from cases of felonies, because they are the most common in the books, and the most striking in themselves; but the principles on which they depend are equally applicable to cases of misdemeanor. In all such cases the real question is, whether the accused did procure, counsel, command or abet the substantive offence committed. If he did, it is of no importance that his advice or directions were departed from in respect to the time, or place, or precise mode or means of committing it.

Gentlemen — the events which have recently occurred in this city, have rendered it my duty to call your attention to these rules of law, and to direct you to inquire whether, in point of fact, the offence of obstructing process of the United States has been committed; if it has, you will pre-

sent for trial all such persons as have so participated therein as to be guilty of that offence. And you will allow me to say to you, that if you or I were to begin to make discriminations between one law and another, and say this we will enforce, and that we will not enforce, we should not only violate our oaths, but so far as in us lies, we should destroy the liberties of our country, which rest for their basis upon the great principle that our country is governed by laws, constitutionally enacted, and not by men.

In one part of our country the extradition of fugitives from labor is odious; in another, if we may judge from some transactions, the law concerning the extradition of fugitives from justice has been deemed not binding; in another still, the tariff laws of the United States were considered oppressive, and not fit to be enforced.

Who can fail to see that the government would cease to be a government if it were to yield obedience to these local opinions? While it stands, all its laws must be faithfully executed, or it becomes the mere tool of the strongest faction of the place and the hour. If forcible resistance to one law should be permitted practically to repeal it, the power of the mob would inevitably become one of the constituted authorities of the State, to be used against any law or any man obnoxious to the interests and passions of the worst or most excited part of the community; and the peaceful and the weak would be at the mercy of the violent.

It is the imperative duty of all of us concerned in the administration of the laws to see to it that they are firmly, impartially and certainly applied to every offence, whether a particular law be by us individually approved or disapproved. And it becomes all to remember, that forcible and concerted resistance to any law is civil war, which can make no progress but through bloodshed, and can have no termination but the destruction of the government of our country, or the ruin of those engaged in such resistance. It is not my province to comment on events which have recently happened. They are matters of fact which, so far as they are connected with the criminal laws of the United States, are for your consideration. I feel no doubt that, as good citizens and lovers of our country, and as conscientious men, you will well and truly observe and keep the oath you have taken, diligently to inquire and true presentment make of all crimes and offences against the laws of the United States given you in charge.

Recent American Decisions.

*District Court of the United States for the District of
Massachusetts, April, 1854.*

IN ADMIRALTY.

PURCELL v. LINCOLN.

Costs in Admiralty, circumstances under which a proctor may not prosecute a suit for, after a settlement without his knowledge by his client for damages and costs.

THE facts in this case may be gathered from the opinion of the court, by

SPRAGUE, J. This is a libel by a seaman against the mate of a vessel for a tort. After the service of the libel the parties made a settlement, and the libellant gave to the respondent a written discharge of both damage and costs. This was done without the knowledge of the proctor for the libellant, who now pursues the action to recover in costs his fees and advances, which have not been paid or secured to him.

The circumstances of this case are peculiar, and such as I think must prevent the court from decreeing in favor of the claim now set up. The process issued was a warrant to arrest. Service was made by taking bail, while the respondent was confined to his bed by illness. A few days afterward, and while the respondent was yet confined by severe, and, as it was said at the time, dangerous sickness, the libellant, of his own accord, went to his lodgings, and there the settlement was made with the aid of a friend of the respondent; the libellant representing at the time that he had fully paid his proctor. The respondent had not seen or consulted counsel, and there is no evidence that he had received any notice of the claim, or of the intention to institute a suit before the service of process.

This court does not encourage suits before notice or request, even in cases of tort, but prefers that an opportunity for a previous settlement should be given. If indeed there be reason to apprehend that the party would avoid the service of process, which is too often the case, the libellant would be fully justified in causing an arrest in the first instance. But here the respondent could not escape; he was confined to his bed by serious illness; indeed such was his condition, that the only service that could have been made upon him was a mere notice by monition, had not his friend voluntarily become his bail.

In Betts's Practice, p. 10, it is said "that in a libel for seamen's wages and a settlement without the knowledge of the

proctor, he may be permitted to prosecute the suit for the recovery of his costs." In Benedict's Admiralty, 302, it is said "that this may be done in a case of collusive settlement;" he refers to Betts, and also to Ware's Reports, 476. The case in Ware does not touch this question, but shows that the whole settlement may be set aside when improperly obtained. This court, in *Rees v. The Brig Planet*, 4 Law Rep. 353, allowed the proctor to proceed and recover his costs after a settlement by the parties without his knowledge. That was a suit for wages by a minor, and a collusive settlement behind the back of the proctor. The right of the libellant to his wages and costs was clear, and the respondent had resorted to false representations before suit brought, in order to prevent the libellant's having the means to enforce his rights. The case now before the court differs from that of the brig Planet, and also from the rules laid down by Betts or Benedict. In the first place, this is a suit for a tort, in which the damages are indeterminate. In the second place, this settlement was not collusive, and such was the situation of the respondent that there was more danger of undue influence or coercion upon him than upon the libellant. I do not mean to decide that a case may not exist in which the court would extend this protection to proctors in a cause of damage, and even when the settlement was not with intent to defeat the proctor of his just claims; but the circumstances of this case are such that I do not think it proper to extend the application of the rule, so as to decree costs for the benefit of the proctor. Libel dismissed, without costs.

A. O. Allen, for libellant; *S. C. Maine*, for respondent.

*Supreme Judicial Court of Massachusetts, Suffolk, ss.
March Term, 1854.*

EDWARD G. LORING, JUDGE OF PROBATE, *v.* THEOPHILUS P. KENDALL et al.

Bankrupt — Jurisdiction — Debts provable — Probate Bond, Breach of.

In a petition in bankruptcy, the petitioner was described according to a form of petition prescribed by the District Court of the United States, before which the proceedings in bankruptcy were had, as "of Boston, in the County of Suffolk and State of Massachusetts;" and it was held, that this was a sufficient allegation of residence within the district; and although the petition did not expressly allege that he owed debts not created in consequence of a defalcation as a public officer, &c., yet as it was in the form so prescribed, and referred to a schedule which did contain debts not fiduciary, it was held sufficient.

Where an administrator neglected to return an account within a year, accord-

ing to the condition of his bond, but did return an account after that time, it was *held*, that the actual allowance of this account, without exceptions, especially upon a certificate of its correctness and a request for its allowance by the parties in interest,¹ was a waiver of the prior breach in not rendering an account within a year, and the judge of probate, or other person suing in his name in a suit on the bond, commenced after such waiver, could not have assigned such failure to account within the year as a breach, and it was therefore not provable against a surety on the bond under subsequent proceedings in bankruptcy; and furnishing a claim for nominal damages only, it would not for that reason be so provable. Nor was the bond provable against the surety before breach in any way, even as a "contingent or uncertain demand" under the fifth section of the bankrupt act. *Quære*, whether it could be proved in case of a clear actual breach, and money due from the principal and sureties, whilst the bankrupt proceedings against the surety were open and in progress, but no judgment of forfeiture on the bond.

As to the nature of a probate bond, and when and how provable in bankruptcy for parties interested.

THIS was an action on a bond given by Kendall, administrator *de bonis non*, with the will annexed, of the estate of John Whitney, late of Boston, deceased, testate, as principal, and the other defendants as sureties, and dated May 28, 1838. The writ was dated Jan. 26, 1852, and the declaration alleged various breaches of the bond; among them, not accounting within a year, and not accounting when cited by the judge of probate in 1851.

The testator devised all his property to his son, J. W. Jr., whom he appointed executor, one third for himself, the other two thirds in trust to pay over the net income in equal shares to his other son, T. W., and his daughter C. M., afterwards by a second marriage, C. P., during life, and at their decease "the share so devised to go to his or her heirs and assigns forever," with certain discretionary powers as to appropriating part of the capital for the benefit of T. W. and C. M. By a codicil he directed that "my said trustee shall deduct the sum of \$400 from the share so devised to him in trust for my daughter C., and cause the same to be invested in the name of J. M. M., my grandson, the interest from time to time to be added to the capital, and the same to be paid over to my said grandson on his arrival at twenty-one years of age." J. W. gave bond as executor, was removed, and Kendall appointed administrator *de bonis non*. No appointment of a trustee was made, except as stated, and no person ever gave a special bond in that capacity. The first and only account rendered by said Kendall was allowed March 22d, 1841, as follows:

"SUFFOLK, ss. At a Probate Court, held at Boston, in said county, on Monday, the twenty-second day of March, in the year 1841, the foregoing

¹ *Quære*, did the parties in interest assent. See the statement of the facts, the will, &c.

account having been presented for allowance, and notice thereof having been given to the parties interested, who have assented thereto, and the same having been verified by the oath of the subscriber thereto, and examined and considered by the court, it is decreed that the same be allowed.

WILLARD PHILLIPS, *Judge of Probate.*"

And bore the following certificates :

" *To the Hon. Willard Phillips, Esq., Judge of Probate for the County of Suffolk :*

The undersigned, being the only surviving heirs at law of the within named John Whitney, deceased, and with the administrator of the estate of their brother, Thomas Whitney, deceased, the only persons interested in the estate of said John Whitney, deceased, hereby certify that they have examined the within account, and finding the same correct, request your Honor to allow and pass the same without further notice to them.

Boston, 1st March, 1841.

JOHN WHITNEY,
CATHERINE PHILLIPS,
PATRICK PHILLIPS.

The undersigned, as administrator of said Thomas Whitney, deceased, hereby certifies to the correctness of the within account.

THEOPHILUS P. KENDALL, *Administrator.*

March 7, 1841."

The administrator charged himself among other items with the following: "Amount taken from the share of C. P., and invested agreeably to the will, for the use and benefit of her son, J. M. M., \$400," and prayed to be allowed "for balance this account to be held in trust for the use and benefit of C. P., agreeably to the provisions of the will, \$1239.23."

All the material facts not already stated, may be gathered from the opinion of the court. The petition in bankruptcy referred to in that opinion, was as follows :

"Petition by Debtor for benefit of the Act of Congress.

To the Honorable the Judge of the District Court for the District of Massachusetts.

Respectfully represents A. B., of Boston, in the County of Suffolk, and State of Massachusetts, that he is owing debts in his private right and capacity to sundry creditors, a list of whose names and places of residence, and the amount due to each, according to the best of his knowledge and belief, is contained in the schedule hereunto annexed, marked A., and that the annexed schedule, marked B., contains an accurate inventory of his property, rights and credits of every name, kind and description, and of the location and situation of each and every parcel and portion thereof; that he is unable to meet his debts and engagements, and he therefore applies to this honorable court for the benefit of the Act of Congress, entitled, 'An Act to establish a uniform system of bankruptcy throughout the United States,' and prays that after due proceedings had, he may be declared by a decree of the court to be a bankrupt, within the purview of the said Act, and upon his compliance with all the requisitions of the said Act, and all the orders and directions of the court in the premises, that

he may be decreed to have a certificate of discharge from all his debts provable under the said Act, and otherwise entitled to all the benefits thereof. (Signed) A. B.

On this sixteenth day of March, A. D. 1842. Sworn to by the petitioner,

Before me, E. G. L., Commissioner of the said court, &c. &c."

C. B. Goodrich, and *George S. Hale*, for the plaintiff.

I. The defendant's petition does not aver, that he resided in the State or district of Massachusetts; nor that he owed debts not created in consequence of a defalcation as a public officer, or as executor, administrator, guardian, or trustee, &c., and his discharge is therefore void. Bankrupt Act, 5 U. S. Laws, 440, 441, sect. 1; *Owen on Bankruptcy*, Appendix, Form No. 1; *Johnson v. Ball*, 15 N. H. 407.

a. The principle which requires the averment of residence, has been recognized by the United States Courts, in *Bingham v. Cabot*, 3 Dall. 382; *Abercrombie v. Dupuis*, 1 Cranch, 343; *Wood v. Wagner*, 2 Ib. 9; Conkling's Jurisdiction of the Courts of the U. S. 222.

b. It must appear from the petition and record, and from the allegations on the record, that the court had jurisdiction. *Cox v. Austin*, Mass. S. J. C., Suffolk, March T. 1853; *Parker v. Phillips*, 2 Cush. 175; *Dearborn v. Keith*, 5 Ib. 224; *People v. Bancker*, 1 Selden, 106; *Castellanos v. Jones*, Ib. 164.

c. So in pleading a discharge in bankruptcy. The plea must allege every requisite for the jurisdiction, especially the facts not here alleged. *Sackett v. Andros*, 5 Hill, 317; *Varnum v. Wheeler*, 1 Denio, 331; *Maples v. Burnside*, Ib. 332; *Coates v. Simmons*, 4 Barb. Sup. Ct. 403; *Seamans v. Stoughton*, 3 Ib. Ch. 344; *Balch, ex parte*, 3 McLean, 221. And see *Thatcher v. Powell*, 6 Wheat. 119; *Hickey v. Stewart*, 7 How. 750; *Wilcox v. Jackson*, 13 Peters, 498.

d. And see further, as to jurisdiction, *Thompson v. Thompson*, 4 Cush. 132; *Peck v. Jenness*, 7 How. 613, 614, cases cited in the argument for the defendant.

II. The debt now sought to be recovered, if within the statute at all as a *debt*, was created in consequence of a defalcation as administrator, and is therefore not barred by the discharge.

a. The statute protects the debt from discharge, without reference to the character and number of those liable, or to the person who may be responsible over to others jointly liable with him.

b. The surety owes the same debt as the principal; he is surety only as between himself and the principal, and all the obligors are principals as to the obligee, until the surety's liability is varied by some act of the obligee relating to it, done with knowledge of the relations of the obligors among themselves.

III. The damages now claimed and assessed by the assessor, were not provable under the proceedings in bankruptcy, because they are damages assessed for the defalcation of Kendall, which was subsequent to the petition and discharge.

a. The bond itself was clearly not provable as a debt before breach. *Dyer v. Cleaveland*, 18 Vt. 241; *Mann v. Houghton*, 7 Cush. 592; *Sleeper v. Miller*, *ib.* 594, note; *Perkins v. Kempland*, Wm. Bl. 1106; *Murray v. Rottenham*, 6 Johns. Ch. 63.

b. Nor as a "contingent or uncertain demand."

This provision does not apply to a mere liability to a future claim — a contingency whether there ever will be a claim — but to present existing claims and demands, depending on a contingency, certainly not to a mere personal liability for the performance of covenants, or obligations by another person to do or not to do some particular act. And this is evident,

1. From the policy of the law; —

2. From the phraseology of the clause in question. Bankrupt Act of 1840, sect. 5.

3. From a comparison of other parts of the Act.

4. And so are the cases. *Woodard v. Herbert*, 24 Maine, 358; *Ellis v. Ham*, 28 *ib.* 385; *Dyer v. Cleaveland*, 18 Vt. 241; *Stinemets v. Ainslee*, 4 Denio, 513; *Abercrombie v. Connor*, 10 Ala. 296; *Prentiss v. Kingsley*, 10 Barr, 120; *Bosler v. Kuhn*, 8 W. & S. 183; *Pogue v. Joyner*, 1 English, (Ark.) 241; *Bennett v. Bartlett*, 6 Cush. 225; *Savory v. Stocking*, 4 *ib.* 607; *McMullen v. Bank of Penn Township*, 2 Barr, 348; affirmed in *Cake v. Lewis*, 8 *ib.* 493.

c. The bankrupt statutes of Great Britain, and the English decisions upon them, are applicable to the United States statutes of bankruptcy. *Livermore v. Bagley*, 3 Mass. 511; *Crafts v. Mott*, 5 Barb. Sup. Ct. 305; *Roosevelt v. Mark*, 6 Johns. Ch. 266, 285; *Woodard v. Herbert*, 24 Maine, 358.

d. And under those statutes and decisions, the present

claim was clearly not provable. *Marshall, ex parte*, 1 Mont. & Ayr. 118, 145, 731; 3 Dea. & Ch. 120; *Thompson, ex parte*, 1 Mont. & B. 219; 2 Dea. & Ch. 126; *Lancaster Canal Co. ex parte*, 1 Mont. Cases, 27; *South Staff R. Co. v. Burnside*, 2 Eng. Law & Eq. R. 418; *Hankin v. Bennett*, 14 Ib. 403; *Amott v. Holden*, 16 Ib. 142; *Lyde v. Mynn*, 1 Mylne & Keene, 683; 4 Sim. 505; *Boorman v. Nash*, 9 B. & C. 145; *Yallop v. Abers*, 1 B. & Ad. 698; *Clements v. Langley*, 5 B. & Ad. 372; *Barker, ex parte*, 9 Ves. 110; *Simpson, ex parte*, 1 Mont. & Ayr. 541; *Johnson v. Compton*, 4 Sim. 37.

e. But it will be said that there was a breach of the bonds by not accounting within a year, which made the penalty provable.

To this it is answered, —

1. A breach of a probate bond cannot exist until judicially ascertained by the court of probate, and no right of action or proof can arise until such adjudication, which was not had here until after the petition in bankruptcy, nor until some actual damage to the parties in interest. Rev. Stat. c. 67, sect. 7–9; Ib. c. 70, sect. 2, 6, 10–12; Ib. c. 79, sect. 5; Stat. 1841, c. 123, sect. 4; *Dawes v. Boylston*, 9 Mass. 357, 358; *Robbins v. Hayward*, 16 Ib. 524; *Coffin v. Jones*, 5 Pick. 61; *Barton v. White*, 21 Ib. 58; *Paine v. Stone*, 10 Ib. 75; *Dawes v. Head*, 3 Ib. 128; *Paine v. Fox*, 16 Mass. 129; *Walker v. Hall*, 1 Pick. 20; *Dawes v. Bell*, 4 Mass. 106; *Crosse, ex parte*, 2 Mont. D. & DeG. 308.

2. The neglect to return an account within a year, if a breach, gave no right of action or proof until the judge of probate should direct the fund in the administrator's hands to be paid over by him, or should direct a suit on the bond. See cases cited under e. 1. *Newcomb v. Williams*, 9 Met. 525, 536; *Marks, ex parte*, 2 Mont. & Ayr. 521; *Crosse, ex parte*, 2 Mont. D. & DeG. 308.

4. And if a breach, it was waived by the subsequent return of an account, approved and accepted by the court and the parties in interest, which amounts to an agreement by such parties, that the previous default should be waived, and no action be maintained on it, nor any proof allowed. See Kendall's account. *Paine v. Moffit*, 11 Pick. 496, 499; *Hogins v. Arnold*, 15 Ib. 259, 263; *Bond v. Cutler*, 10 Mass. 419; *Gage v. Gannett*, 11 Ib. 217.

5. The damages now sought to be recovered and assessed by the assessor, are not for that breach, but a subsequent breach, viz., not accounting when cited in 1851. See the declaration, plaintiff's specification of claim, and defendant's set-off, Kendall's account, of March, 1841, and the assessor's report.

6. The bond is a continuing security, and new breaches gave new causes of action, not provable under the proceedings in bankruptcy. *Taylor v. Young*, 3 B. & Ald. 521; *Granger, ex parte*, 10 Ves. 351; *Amott v. Holden*, 16 Eng. Law & Eq. R. 142; *Austin v. Moore*, 7 Met. 116; *Shute v. Taylor*, 5 Ib. 61, 67; *St. Martin v. Warren*, 1 B. & Ald. 491; *Miller v. Whittenbury*, 1 Camp. 428; *Waldo v. Fobes*, 1 Mass. 10; *Watkins v. Flanagan*, 8 Moore, 480; *Mills v. Auriol*, 1 Hen. Bl. 433.

7. If necessary, judgment may be entered on the counts in the declaration alleging breaches in 1851, and a *nolle prosequi* entered as to any other counts, or the declaration may be amended by striking out such other counts.

8. The English cases allowing proof of bonds in case of a single breach, do not apply to our probate bonds, nor to any continuing security for collateral acts, of which there may be successive breaches, the damages by which are uncertain, but only when the whole amount to become due is computable and ascertainable. *Taylor v. Young*, 3 B. & Ald. 521; *Alsop v. Prince*, 1 Doug. 160, 3d ed. and cases in notes.

IV. The damages by such breach, (or any other,) were damages for a failure to fulfil a covenant or obligation for the doing of a certain act, and were unliquidated and incapable of valuation or proof in bankruptcy. This is certainly the case as to breaches not occurring before the petition, and such damages could be liquidated and ascertained only by the judge of probate, or by a jury or an assessor, under the direction of the Supreme Court acting as a court of probate. *Utterson v. Vernon*, 4 T. R. 570; 3 Ib. 547; *Bannister v. Scott*, 6 Ib. 489; *Hammond v. Toulmin*, 7 Ib. 612; *Boorman v. Nash*, 9 B. & C. 145; *Atwood v. Partridge*, 4 Bing. 209; *Tindal, ex parte*, 8 Ib. 402; *Brown v. Lee*, 6 B. & C. 689; *Jameson v. Campbell*, 5 B. & Ald. 250; *Sloman v. Waller*, 1 Bro. C. C. 418; *Crosse, ex parte, St. Martin v. Warren, Miller*

v. Whittenbury, supra; *Green v. Bicknell*, 8 Ad. & El. 701; *Goddard v. Vanderheyden*, 3 Wils. 272.

S. Bartlett, and *Geo. W. Minns*, for the defendant. See Rev. Stat. ch. 70, § 6, § 10, cl. 4, and § 11, as applicable to this action.

1. The bond is dated May 28, 1838. It was broken at the expiration of a year from that date, by the administrator's not having rendered an account within one year. The defendant A. B., on the 18th of October, 1842, was discharged from all debts owing by him on the 16th of March, 1842.

2. The claim against him on this bond could have been proved against him in bankruptcy; and his certificate is a bar to this action. United States Bankrupt Act, Stat. 1841, ch. 9, §§ 4, 5, 7, U. S. Stat. at Large, p. 440, 441, 445, 446; *Jameson v. Blowers*, 5 Barb. 686; *Campbell v. Perkins*, 16 Law Rep. 231; *Hatton v. Speyer*, 1 Johns. 37; *Boyd v. Vanderkemp*, 1 Barb. Ch. 273; *Dyer v. Cleaveland*, 8 Verm. 245; Rev. Stat. of Verm. ch. 25, § 42; *United States v. Davis*, 3 McLean, 484; *Dusar v. Murgatroyd*, 1 Wash. C. C. 17, and notes; *Utterson v. Vernon*, 3 T. R. 539; *Clinton v. Norton*, 1 Johns. 375; *Mace v. Wells*, 7 How. 275; *Fullwood v. Bashfield*, 14 Penn. 90.

3. The petition was in the form prescribed by the statute and by the rule of the district court, and therefore sufficient.

On the question of the correctness of the form of the petition, see *Morse v. Cloyes*, 11 Barb. Sup. Ct. 100; *King v. Deitz*, 12 Penn. 156; Bankrupt Act, § 6.

4. J. W., Jr., was appointed trustee by the will, and also executor. He gave bonds as executor and none as trustee, and was removed from the office of executor but not from that of trustee, and Kendall was appointed administrator *de bonis non* in his place, but not trustee.

Kendall did not succeed W. as trustee, and had nothing to do with the real estate. Had he with the trust property at all?

On stating his account, there appeared a certain sum, \$1229.23, belonging to C. P., and \$400 belonging to J. M., which he was bound to pay to any trustee, and this was a debt due at once on stating the account, and provable in bankruptcy against the defendant, A. B. *Hall v. Cushing*, 9 Pick. 395; *Dow v. Wainwright*, 13 Ib. 328; Rev. Stat. ch. 63, § 7, ch. 69, §§ 1, 2, 7, 9.

SHAW, C. J. — This is an action of debt on a probate bond, given by said Kendall as principal, and by the other defendants as sureties, upon the appointment of said Kendall as administrator *de bonis non*, with the will annexed, of the estate of John Whitney. The estate had been partially administered by the executor named by the testator, who was removed and Kendall thereupon was appointed administrator *de bonis non*, and executed the bond in question to John Heard, predecessor of the plaintiff in the office of judge of probate; and this bond is now sued by the plaintiff as his successor.

The parties having been defaulted, the case has been referred to an assessor, to examine the accounts, and report for what sum execution should be awarded; and the only question now brought before the court, the same having been reserved by consent notwithstanding the default is, whether A. B., one of the sureties, is liable, or whether he has not a good defence under a certificate of discharge in bankruptcy.

The bond was dated May 28, 1838, with the condition in the usual form required by law.

The defendant A. B. applied by petition to the district court of the United States on the 16th of March, 1842, to be declared a bankrupt, under the bankrupt law of the United States, passed August 1841, which petition, after due notice, was allowed, he was declared a bankrupt, and the usual course of proceedings had thereon, and on the 18th of October, 1842, he received a certificate of discharge in the usual form, of and from all his debts, owing by him, on the 16th of March preceding. Some objections are taken to the validity of this discharge, for want of jurisdiction of the court.

1. It is contended that it must appear that the bankrupt resides in the district where he applies, and that it should be distinctly averred in the petition that he resided in the district of Massachusetts.

Here he is described as A. B. of Boston, in the County of Suffolk and State of Massachusetts, and we may judicially take notice, that this is within the district of Massachusetts. Besides, the act itself, § 6, gives the district court in each district, authority to prescribe suitable rules, regulations and forms of proceeding, and in executing this duty, the court is enjoined to make them as simple and brief as practicable. It is found that this petition was

in the form prescribed by the court for this district. This objection is overruled.

2. Another exception is, that the petitioner did not state that he owed debts, not created in consequence of defalcation as a public officer, or as executor, administrator, guardian or trustee, or acting in other fiduciary capacity; and therefore that there was not enough stated in the petition to bring the case within the statute, and give the district court jurisdiction.

But we think this objection cannot prevail. Again alluding to the above cited authority respecting rules, regulations and forms, requiring them to be brief, and to the fact that this petition pursued the prescribed form, we may add, that by the petition itself a list of the debts was made part of it, and by the list, it appears, that he did owe a large amount of debts not fiduciary, and so on the whole petition enough was stated to bring the case within the bankrupt law. The bankrupt is bound to show on his schedule the nature of his debts, at least so far as to enable the court to take jurisdiction of them. *Chapman v. Forsyth*, 2 How. 209.

We are then to consider whether this certificate is a bar to the debt or demand sued for in this action. The discharge, as we have seen, is of all debts due on the 16th of March, 1842, and the question is, whether it is a bar to this action on a probate bond, of a date prior to such discharge.

A probate bond under the law of Massachusetts, is a security and obligation of a peculiar character, given by an officer, charged by law with a duty and trust of a various and miscellaneous character, usually given in a round sum, with condition to perform the duties of such trust. This condition, though expressed in few words, from its very generality embraces a great variety of acts, to continue for a series of years, in which a great variety of persons may have interests as creditors, legatees, distributees, annuitants, wards, minors, married women and others. It is given to the judge of probate, not in his personal, but in his official capacity, as trustee for all persons beneficially interested, and on his decease, it passes to his successors in office, not to his personal representatives. It is obviously, therefore, a continuing obligation, of which there may be various and successive breaches. When put in suit, it must be in the name of the judge of probate, and judgment is rendered

for the entire penalty, and execution may be awarded according to circumstances, and upon particular breaches averred and proved in favor of certain individuals, as judgment creditors, creditors whose debts have been allowed under a commission of insolvency and payment of a dividend decreed thereon, or distributees whose claims are ascertained by a probate decree of distribution, or to the judge of probate himself, for the general benefit. In case these various awards of execution do not exhaust the whole penalty, the judgment for the residue stands as a security for any other breach, which may at any time afterwards occur, to be sued for by a *scire facias*, either for the benefit of a party entitled to claim in his own right, or by the judge of probate, as trustee for others.

We have thus far spoken of the liability created by a probate bond, as it affects both the principal and sureties. The administrator himself may be subject to various suits, by action or *scire facias*; but the only liability of the surety is on the bond, and the only cause of action upon that liability, is the action to be commenced and prosecuted in the name of the judge of probate.

In order, therefore, to see whether the bankrupt was discharged by his certificate from his obligations as surety on this probate bond, we must see whether there was any debt or claim which might have been proved, under the commission of bankruptcy, against the surety.

An administrator with the will annexed, is to give a like bond with an executor; and the executor is to give bond amongst other things, to render an account within one year. Rev. Stat. c. 63, § 8, and § 2, clause 3. And in this case the facts show, that no account was rendered by the administrator within one year, and so it is contended there was a breach of the bond.

If it were so, it may be answered, that such a breach would be merely formal, would furnish a claim for nominal damages only, and so would not be a debt provable against a surety in bankruptcy.

But we think there is, upon the facts, a better answer, which is, that such breach was waived before any claim against the bankrupt's estate could be made. The bond was given May 28, 1838, and the year expired May 28th, 1839. The first and only account rendered by the administrator bears no date, but the certificate of approval by the parties interested is dated March 1st, and the account was

allowed and passed at a probate court on the 22d of March, 1841. The actual allowance of this account, without exceptions, especially upon the certificate of its correctness, and a request for its allowance, by the parties in interest, was a waiver of the prior breach in not rendering an account within a year, and the judge of probate, or other person suing in his name, in a suit on the bond commenced after such waiver, could not have assigned such failure to account within the year, as a breach.

The case then was that of a subsisting, outstanding, unbroken bond, on which the bankrupt stood as surety, conditioned for the performance of duties created by law, by an administrator having the means in his power to perform all those duties, for he could be no further liable than he had assets to meet such liability. It was, therefore, in legal effect, a bond conditioned for the fidelity of an officer appointed by law, to discharge plain and well-defined duties. Such an existing obligation, we think, can in no just sense be considered a debt either *in presenti* or *in futuro*. It may, in case of any future breach, be the foundation of a debt; but any claim arising from it in the nature of a debt, will arise from the breach, and not from the mere existence of the obligation.

Nor can this come under the head of contingent claims, as expressed in the fifth section. This applies, either to the case of debts *in presenti*, and such as will become due by lapse of time only, or, if contingent, such as those of indorsers, sureties, bail, &c. When these debts become absolute, such creditors shall have a right to prove, and have them allowed. This manifestly applies to all that class of contingent liabilities where a possible or contingent liability exists at the time of the filing of the petition, and where such contingency has happened, and the contingent liability has become an absolute debt, as where an indorser or surety has paid the debt of his principal, and thereby become his creditor, in season to enable such creditor to prove his debt, or before the time for offering proof has passed, and the settlement of the estate been closed, and the funds distributed. The case presupposes that payment by the surety has been made, and so the debt become absolute.

The effect of the discharge is expressed more than once in the act, with some slight difference in the language used. The provision in section four is, that "Every bankrupt who

shall surrender, &c. shall be entitled to a full discharge from all his debts." In another part of the same section it is declared, that "Such certificate when duly granted, shall in all courts of justice be deemed a full and complete discharge of all debts, contracts and other engagements of such bankrupt, provable under this act." Here, although the phraseology slightly varies, the effect is the same. It is true the terms "contracts and engagements" are used, yet they are contracts and engagements provable, and therefore contracts and engagements upon which there is some debt payable presently or hereafter, or some claim or demand for money upon which the holder can come into competition with other creditors, and justly claim, *pari passu* with them, an equal distribution of the effects of a common debtor. Taken, therefore, in connection with other provisions, and the general purposes and tenor of the act, the discharge cannot extend to contracts upon which no claim can be now founded, and in regard to which there is no reason to presume that any demand for money will ever exist.

The actual breach upon which the condition of this bond afterwards became forfeited, took place ten years after, when the administrator, upon being cited, failed to appear and render an account, and thereupon a cause of action accrued. To this, the court are of opinion, that the defendant Lawrence's discharge in bankruptcy in 1842, is no bar.

Thus far we have treated a probate bond as if it were a common law security, held by the judge of probate, which in case of a breach of condition, he may have an action upon, or prove in a proceeding under the jurisdiction of the United States courts. But we have very great doubts whether it could ever be so treated or used, in case there had been a clear, actual breach of the condition, and money due from the principal and sureties, whilst the bankrupt proceedings against the surety were open and in progress, but no judgment of forfeiture on the bond. We have already said that a probate bond is an obligation of a peculiar character. We may add, it is not only provided for by the statute, but its legal effect, the mode in which it is to be used and prosecuted, the rights of parties to be secured by it, are all regulated by the statute. It is filed in the probate office for the benefit of all persons interested; suits may be brought upon it by certain creditors

and distributees whose claims have been liquidated and ascertained by judicial decision, without application to the judge of probate. Rev. Stat. c. 70, §§ 3, 4, 5, 6. In all other cases application is to be made by a party interested, to the judge of probate for leave to sue the bond; if granted, such applicant indorses the writ, and becomes personally liable for costs, if he fail in the suit. The suit must be brought originally in the Supreme Judicial Court, and in the same county, in the probate court of which the bond is taken. Either then, the bond before suit, or the judgment for the penalty rendered afterwards stands open and accessible to all persons, for whose benefit the law directs it to be taken, and for whom it is to stand as a security. And each of such parties may have a writ of *scire facias* in his own name, to recover part of said penal sum to his own use. Such a bond, therefore, has very few of the characteristics of a writing obligatory at common law, either as to parties, legal operation or remedies, the objects to be obtained, or the mode of obtaining them.

After judgment in the tribunal which alone has jurisdiction of a probate bond, where the liability both of principal and sureties is ascertained and fixed by a judgment for the penalty, and certain individuals in their own right, or the judge of probate, as trustee for others, have acquired a right to claim particular amounts, we are not prepared to say that such claims might not, in case of the bankruptcy of the surety or even of the principal, be laid before the commissioner and proved; the evidence in such case, being the judgment in a court of competent and exclusive jurisdiction, and the awards of execution under it. But until a judgment on the probate bond, there appear to be strong reasons why such a bond cannot be deemed a debt, which could be proved, and if so, the liability of the surety for this reason also, is not barred by his certificate of discharge in bankruptcy.

Abstracts of Recent American Decisions.

Supreme Judicial Court of Massachusetts, Suffolk, ss., March Term, 1854.

Agency — See *Evidence*.

Contract — See *Shipping*.

Coroner — See *Habeas Corpus*.

Damages — See *Way*.

Deed — See *Way*.

Evidence, as to Signatures — *Agency*. Trover for a promissory note payable to the order of the plaintiff's insolvent, G. L., purporting to be indorsed by said L., on the ground that it had never legally passed out of L.'s hands by indorsement or otherwise. Defence, that it had so passed either by L.'s indorsement or by an indorsement in which his name was used by his authority, and a delivery authorized by him, in payment of a debt to a person from whom the defendants received it, when not due, in the usual course of business, for a valuable consideration, without notice, in and good faith. Evidence was offered that one W., at the time he indorsed L.'s name on a certain draft discounted by the witness, stated that he had authority from L. to sign his name, but *held* inadmissible. One witness testified that as he was one day standing at the door of No. 111 State Street (the number of L.'s place of business), he saw L. sitting in a buggy in the street in front of said store; that W. his clerk handed some papers to him, and held an inkstand, and gave L. a pen as if to have him write something on the paper. L. took a check-book as he sat in the buggy and placed it on his hat, and rested said papers on it, and as witness supposed, wrote on them. What L. wrote, if anything, witness was not near enough to see, and could not say; but after L. went away, witness said that he (witness) went up with W. into the counting room, and W. had there some signed and indorsed notes; "the same," the witness said, "that were handed back to W." On this evidence the defendants proposed to ask the witness whether L.'s name on the note in controversy was his genuine signature; *held*, that the witness was not competent to testify as to the genuineness of the signature; that before being introduced to testify as to the genuineness of a controverted signature from his knowledge of the handwriting of the party, a witness ought, beyond all question, to have seen the party write, or be conversant with his acknowledged signature. So a witness was *held* incompetent for that purpose who was teller of a bank, and testified that L. kept a deposit account with the bank, and that he (witness) had seen and taken at the bank a large number of checks, purporting to be drawn by L., though he had not seen him write, inasmuch as it appeared that the genuineness of those drafts was alike in question, and was shown by the evidence in the case to be directly involved in the issue as to the note in controversy in the present suit, both being alleged to have been written by W. and not by L. But testimony that the signature on the back of the note in controversy was the signature upon which L.'s business had been transacted in 1849 and the early part of 1850, the period immediately preceding and subsequent to the date of this indorsement, was *held* admissible to prove that there was a valid transfer of the note, either by his own signature or by a signature recognized and adopted by him, and if the signature on the note was in the same handwriting that L. had adopted as his in his usual business transactions, it was *held* compe-

tent for the defendant to show that fact. *Held* further, that if the jury found the fact to be that the note in controversy was passed by W. to an other party in payment of a debt of G. L., and that the fact of such transfer of the note for that purpose, with all the circumstances connected with the transaction, became known to L., it would be L.'s duty, in a reasonable time after notice came to him of that fact, to repudiate the transaction, and disavow the act of W. as unauthorized; and if he failed so to do, he would virtually ratify and adopt the act of W., his professed agent, and be bound by it. — *Brigham et al. Assignees v. Peters.*

Fraud— See *Poor Debtor.*

Habeas Corpus — *Jurisdiction* — *Coroner* — *Sheriff* — *Warrant.* *Habeas Corpus* by T. A., sheriff of N. county, alleged to be imprisoned and unlawfully detained by R. V., coroner of said county. The return to the writ of *habeas corpus* set forth as the cause of the imprisonment and detention, a mittimus issued by a justice of the peace for said county, reciting certain proceedings had before him on the complaint of one C., charging A. with selling intoxicating liquors contrary to the provisions of Stat. 1852, c. 322, § 7, an adjudication that he was guilty of the offence charged, and a judgment of said justice that he pay a fine of ten dollars and costs of prosecution, and give bond in \$1000 not to violate within one year any law of the Commonwealth concerning the sale of spirituous or intoxicating liquors; that said A. refused to comply with said order, and "it is therefore ordered by me that the said Adams be committed to the common jail in Dedham, in said county of Norfolk, there to remain until he comply with the foregoing order, or be discharged by due course of law, and you the said keeper [of the jail] are hereby commanded to receive the said Adams into your custody in said jail, and him safely keep until he shall comply with said order." It appeared that on the trial of said complaint, the petitioner offered evidence in defence, that the sale of liquors complained of was made by him as sheriff on an execution: *Held*, that the court would not in this collateral way review the case tried before the justice, and reverse a decision made by him in a matter within his jurisdiction. The fact of his authority to receive and act upon such complaint, and to issue a warrant, or to hear the case and adjudicate thereon, might all properly be raised on the hearing of this *habeas corpus*, but it was not open to the petitioner to call in question in this court the correctness of the decision of the justice as to the sufficiency of the evidence offered to sustain the complaint, or the legal effect that should have been given to the evidence in the defence, or to show that if there had been a proper application of the law to his case he would have been acquitted. The error of the justice, if any, in deciding on the sufficiency of the evidence, or as to the law applicable to the facts, was to be corrected by an appeal to the Court of Common Pleas, and by exceptions to its decisions on matters of law to this court, and if the justice had jurisdiction of the matter or case he was to determine, though his judgments be erroneous, yet it must stand good until reversed by due proceedings in some higher court instituted for that purpose, and was not to be examined collaterally, as it would be in a proceeding under a writ of *habeas corpus*. That here the justice appeared on the record to have had jurisdiction of the matter, and the office of the petitioner did not entitle him to have the error of the justice, if any, acting within his jurisdiction, in deciding in relation to acts alleged to be done by him *virtute officii*, corrected in this summary manner. *Held* further, that the coroner of the county was a competent officer to serve such warrant, and that the term *precepts* used in the statute, conferring powers on him when the sheriff is a party or interested, (Rev. Stat. c. 11, § 97,) includes criminal as well as civil processes.

But it was further *held*, that the *mittimus* in this case being a mandate to the coroner to commit the sheriff to the jail of his own county of which the sheriff himself had the custody and controul. was an invalid warrant, as no effect could be given to such an order, or the party held in custody as his own prisoner; and such being the case, the law would not justify his imprisonment for the purpose of carrying him to the jail, and the warrant to that effect was invalid; and the petitioner's imprisonment and detention appearing to be solely by virtue of this *mittimus*, that he was wrongfully detained in custody by the coroner, and entitled to be discharged.—*Thomas Adams' Case.*

Insolvent Debtor — See *Trustee Process.*

Jurisdiction — See *Habeas Corpus.*

Jury — See *Verdict.*

Livery Stable — See *Statute.*

Master — See *Shipping.*

Mechanics' Lien — *Stat.* 1851, c. 343. Where H. held a bond from the owner of land which entitled him, on the performance of certain contracts to the conveyances thereof, and A. contracted with him to build certain houses on the land, and M. performed labor on the houses, under a contract with A., to whom a deed of the land was afterwards delivered; it was *held*, that M. had no lien on the land under the Mechanics' Lien law, *Stat.* 1851, c. 343. — *Metcalf v. Hunnewell.*

New Trial — See *Practice.*

Poor Debtor — *Charge of Fraud against.* Appeal from two justices of the quorum on certain charges of fraud against the defendant H., on his application to take the poor debtor's oath. *Rev. Stat.* c. 98, §§ 27-37. It was here charged "that at the time the debt was contracted for which the said H. was committed, he did not intend to pay the same," and that "he contracted said debt having no intention to pay the same, and having no expectation that it would be paid."

The statute provides, that the charges made "shall be substantially the following, or some of them." The fourth charge allowed is, "Fourthly, if the action was founded on contract; that the debtor contracted the debt with an intention not to pay the same." *Held*, on a motion in arrest of judgment, that the 29d section of *St.* 1852, c. 312, in regard to motions in arrest of judgment applied to the "actions" at law which are the subject of the preceding sections of that chapter, and not to this case, and that not intending to pay was not the same within this statute as intending not to pay, and that the charge here made was not a charge of any act of fraud specified in c. 98; and judgment was arrested. — *Chamberlain v. Hoogs.*

Practice — *New Trial* — *Indorsement of Writ* — *Statute* 1844, c. 162. Where an action in which the *ad damnum* was over \$600. had been twice tried in the Court of Common Pleas, and both parties were desirous that it should be tried the third time, certain exceptions having been sustained, in the Supreme Court, it was *held*, that the case could not be then removed to that court by consent of parties under *Stat.* 1844, c. 162; and the application to have it tried there being therefore at the discretion of the court, and as they were of opinion that it was a suitable case for trial below, and as an earlier trial could be had there, it was ordered that the new trial should take place in the Common Pleas. In the same case a motion was made for an indorser, on the ground that one of the plaintiffs had deceased, and the other had gone to California, which facts had first come to the defendant's knowledge at the current term. The motion was resisted, on the ground that it was not made at the first term after the occurrence of the facts relied on. The court were of opinion that where the plaintiffs removed out of that State while an action was pending, it was

clearly within the policy of the law that an indorser should be required, and ordered the writ to be indorsed. — *Smith v. Castles.*

Sheriff — See *Habeas Corpus.*

Shipping — *Master* — *Contract.* Contract for one quarter part of the earnings of the brig G.; T. owned one quarter of the brig, and his interest was attached in Maine, and a bond given by the plaintiff to dissolve the attachment. The defendant sailed her on shares as master, and he gave a written agreement to pay over all the earnings on account of one T.'s said interest to the plaintiffs, or C. and F. their assignees. The plaintiffs made a demand for the sums sued for on the defendant, who had previously contracted debts on account of the vessel, which were charged to the "Brig Galena and owners" by the creditors, to an amount greater than the sum claimed by the plaintiffs, which remained unpaid at the commencement of the action. *Held*, that as he was personally liable for such debts while they were outstanding, he could not be required to pay over the money in his hands which might be needed to discharge them. — *Call v. Richards.*

Statute — *Livery Stable.* Tort for the penalties given by Stat. 1810, c. 124, entitled "An Act to prevent livery stables from being erected on certain places in the Town of Boston." The defendants, in Nov. 1850, opened a stable in Boston at the corner of Essex Street and Brimmer Place, in which the plaintiff resided, and within 170 feet of the Essex Street Church, which church was erected and used for the public worship of God, and the defendants continued to keep said stable until Sept. 1851, inclusive. In the same they kept two hacks, and horses to let, and took and kept horses, chaises and other vehicles upon hire. The court, by agreement were to draw inferences as a jury. An old dwelling-house, partly of wood and partly of brick, stood on the premises prior to 1810, which was, as it was stated in the opinion of the court, "remodeled, extended in size and fitted up for a new purpose, and was designed and adapted for use 'as a stable for the taking in and keeping horses upon hire or let, commonly called a livery stable,'" and they were of opinion, that the case was within the statute of 1810; that that statute was repealed by implication by Stat. 1814, c. 74, and revived by the repeal thereof, and not repealed by the Revised Statutes. — *Hastings v. Aiken.*

Trustee Process — *Insolvent Debtor.* Trustee process to charge S. and E. trustees under a certain indenture, by which the defendants assigned their partnership property in trust for creditors who should become parties, with a clause that if proceedings under the insolvent laws should be commenced, then to pay over the balance then undisposed of to the assignee in insolvency. Only one creditor became party to the indenture, and his debt was less than the amount of merchandise transferred by the assignment. Other creditors compounded with the trustees and signed a release. *Held*, that this, as an assignment and conveyance of property to trustees, was inoperative and void as against creditors not parties thereto, and liable to be set aside and invalidated by or in behalf of such creditors, in any of the modes provided by law, as by a seizure or execution, or an attachment on means process by a creditor of the assignors, or by the assignee constituted under proceedings in insolvency. That it was so, 1st, because inconsistent with Stat. 1836, c. 238, which was repealed only so far as inconsistent with the subsequent insolvent laws, and because inconsistent with the said insolvent laws; 2d, that it was so at common law, as understood and administered before that statute. That the conveyance was not absolutely void, but voidable; and the property conveyed by it might be reached by the trustee process, if in its nature attachable in this form, by a creditor not a party. — *Edwards v. Mitchell and Tr.*

Verdict — Jury. The plaintiff P. recovered judgment against H. for \$2700, and trustees summoned disclosed funds in their hands to the amount of \$2565. B. came in and claimed \$416 of said funds under an assignment from H., and \$2000 on an order drawn by H., upon him and by him accepted in favor of E. J. B. S. & Co. also came in and claimed \$880 of said funds as belonging to them. A separate issue was joined on each of these two claims, wherein P. denied that either of the claimants had any such legal claim on said funds as they set up. The jury agreed upon a verdict, and afterwards separated for the night, during the adjournment of the court, and came into court the next day with the following sealed verdict. "The jury find for the claimants as follows; the sum of four hundred and sixteen dollars (say, \$416,00) in favor of E. S. B. The net proceeds (deducting charges) on the account of sales amounting to eight hundred and eighty dollars and nineteen cents, marked letter D, to Messrs. B. S. & Co. The balance of account in the hands of said trustees to parties claiming under said B. S. & Co." Said verdict was opened by the clerk, and not appearing satisfactory to him, he gave it to the counsel to put it into form; they could not agree; and after examination thereof by the court, the jury were again sent out to put their verdict into form, so as to conform to the issues tried and there found, the plaintiff objecting. And they afterwards returned the following: "The jury find for the claimants as follows; that the said E. S. B. has a claim upon the goods, effects and credits in the hands of said trustees to the amount of four hundred and sixteen dollars; the jury find also that B. S. & Co. have a claim upon the said goods, effects and credits in the hands of said trustees to the amount proceeds of sales of said goods, effects and credits, after deducting the aforesaid amount of four hundred and sixteen dollars, to the amount of \$870." This being unsatisfactory to the claimants and to the court, and not embracing all the issues, they were sent out a third time, plaintiff still objecting. Before they retired this time, the court asked whether they intended to allow E. S. B. his claim on the funds on account of the acceptance of the order drawn on him by H., and by him accepted in favor of E. J., and the foreman answered that they did. The third time they brought in a verdict substantially the same as the second, with the following addition: "The jury also find that the said E. S. B., for an amount of an order accepted by him in favor of Mrs. E. J., has a claim for whatever balance may exist from the proceeds of said goods, effects and credits in hands of said trustees, after deducting the aforesaid amount of \$416 and \$870." This was accepted by the court, the others not having been affirmed by the jury or recorded, the same being objected to by the plaintiff. *Held*, that the first findings of the jury were incomplete, and they were properly sent out to find a verdict which should pass upon the whole case presented to them, although they had separated as stated, after their first finding, before they came into court. — *Pritchard v. Hennessey and Tr.*

Warrant — See *Habeas Corpus*.

Writ, Indorsement of — See *Practice*.

Way — Damages — Dred. This was an action of tort under the new practice. The declaration alleged that the defendants forcibly entered the plaintiff's close, broke and subverted the soil, used the same for a place of deposit for merchandise, and constructed a railway over the same. The *locus in quo* was a passage-way in the rear of certain warehouses, of which the defendants were tenants for years, and as such, in common with other abutters, entitled to a right of way over the close, under the following provision of a certain indenture. It is mutually agreed by and between the same parties, that the said passage-ways shall be and continue open and common for the free use and passage of the abutters upon the said passage-

ways, respectively, and to be used and enjoyed by them in as full a manner as they now are, and heretofore have been used and enjoyed." The plaintiff was the owner in fee of the soil of the passage-way. The defendants had used the same as a place of deposit for merchandise, but upon objection by the plaintiff, had ceased so to use it. They had also laid a flooring of plank across the passage-way, the warehouses occupied by them being at the rear of the passage-way, which was a *cul de sac*, from the back door of one warehouse to that of the other, and laid iron tracks or rails thereon, to facilitate the transfer of the heavy articles in which they dealt, being iron merchants, from one warehouse to the other. These planks and rails were at first laid wholly above the level of the soil, but the passage-way was subsequently repaired and raised by the plaintiffs, so that they were, at the time the action was brought, a little and but a little above the surface. In laying them it was not necessary to subvert the soil, but they were laid on the surface and remained there permanently. There was no evidence that such use had been made of the place, either for transit or deposit, until so made by the defendants, nor did it appear that the plaintiff sustained any special or actual damage thereby. The action was brought to recover damages for a violation of the plaintiff's right in laying down said planks and rails, and using the passage-way as a place of deposit for goods.

The Court of Common Pleas instructed the jury, (1), that the abutments had a right to use the passage-way in the manner and for the purposes mentioned and reserved in said indenture, and that they were not restricted in such use of it to the state and condition in which the land was when the easement was thereby created, but that they, severally, might lawfully make such alterations and improvements thereon, not thereby hindering or interfering with other parties in the enjoyment of their respective rights, as would enable them most beneficially to avail themselves of their own; (2), and that any one of them might legally do to the surface of the land anything adapted to promote the use of it for the purposes for which the easement was created, and which would facilitate his own use of it, as by covering it with plank, laying down iron railways or other fixed or permanent structures upon it, provided that what was so done would not interfere with the enjoyment of any right of any of the other abutments or other persons having an interest therein, or with the use to which the owner in fee of the land could, in some way, appropriate or avail himself of the same; that the plaintiff was not entitled to a verdict in this action, even for nominal damages, unless they were satisfied upon the evidence that some acts done by the defendants in or to the land of the passage-way, either did disturb or interrupt him in the use or enjoyment of the land, for any purpose to which he could lawfully appropriate or devote it, subject, as it was, to the existing easement, and unless also he had already suffered or was there afterwards in danger of suffering some loss or damage, which must not be merely speculative, conjectural, or imaginary, but real, actual, and capable, if it had occurred or should occur, of being estimated, weighed or appreciated.

There was a verdict for the defendants, and the plaintiff excepted.

Held, that the plaintiff being the owner of the soil, had the right of possession, as it was not transferred, or the land demised to any other, and therefore might maintain an action of trespass *qu. cl.*; that the first instruction of the Court below was correct, and that the words of the deed did not prevent the defendants from having a full right of way for all purposes, with all improvements, not only in the manner before used, but in any other manner of using the same right; that the words quoted, if they had any operation, were intended to enlarge, not to restrict the right reserved

by the general terms; e. g., if it had been a mere surface of earth, it might be improved by macadamizing, paving or planking, being limited to the use of the same right in a manner more convenient and beneficial for those having the common right; and that this was the proper construction of the reservation; that the whole of the instruction as to the right of way was substantially correct, though in strictness it was perhaps rather a question of fact than of law, and that it should have been left to the jury to determine from the evidence whether the laying down, by the defendant, an artificial structure of a fixed and permanent character, at their own expense, and for their separate benefit, although it did not interrupt other abutters in their use of the surface as a passage-way, or cause any actual damage to the owner of the soil, was or was not a use of the soil for a distinct purpose beyond that of a right of way; if it was a use for a distinct purpose, it was adverse to the right of the plaintiff; keeping it there twenty years would have given the right to the defendants to continue it, and if such were its nature and character, the plaintiff would have a right to maintain his action, and recover nominal damages, in order to vindicate his right. But if the laying down of a platform of plank on the ground, with iron rails or bars along it, on a level or nearly on a level with the residue of the yard or passage-way was not a new and distinct use of the soil, but only an improvement of the surface, to fit it the better for the passage of persons, teams and carriages, and the transportation of merchandise, not injurious to the other abutters or to the owner, it was within the right of way reserved to the abutters, not adverse to the right of the owner; no right would be acquired by its continuance, and therefore the action could not be maintained. It was further held, that the use of the passage-way as a place of deposit for merchandise was a use of the soil not warranted by the reservation of a right of way to and from the warehouses, but that a right of way carried with it all rights to the use of the soil properly incident to the free exercise and enjoyment of the right granted or reserved. A right of way to a warehouse would authorize the tenant to place goods brought to the warehouse, on the ground, and keep them there a reasonable and convenient length of time to put them in store; and to place and keep goods which are to be carried from the warehouse, on the ground for a reasonable and convenient time. And what would be a reasonable and convenient time would be a question of fact, depending on many circumstances. What would be an unreasonable length of time to leave goods on the sidewalk or on the street, where much frequented, would not be unreasonable on rear ground, where they would incommode no one having an equal right of way. That the defendants ceasing to use the close for a place of deposit, as above stated, was no compensation for damages already accrued, and that the plaintiff was entitled to nominal damages for such use; that the directions of the court below seemed in terms to apply to the whole case, and in the opinion of this court, must have been so understood by the jury, without regard to the difference between the distinct grounds of the action, and for this ground this court were of opinion that the verdict should be set aside, and a new trial had.— *Appleton v. Fullerton.*

Miscellaneous Intelligence.

AN IMPORTANT QUESTION OF UNITED STATES JUDICIAL PAY.— A Territorial Judge appointed by the President, by and with the advice and consent of the Senate, for the term of four years, was removed from office and his successor appointed before the expiration of said term. He has been paid his salary up to the day, inclusive, on which he was legally

notified of his removal, and he claims salary for the whole term of four years. It is held that when the President and Senate of the United States exercise a power, which, in their opinion, has been conferred on them by the constitution or by the law of the United States, the accounting officers have not the authority or right to say officially, that the exercise of such power is unconstitutional and illegal, and should be by said accounting officers disregarded and held for naught. Two persons cannot hold the same office at the same time, and the President of the United States having thought proper to remove said judge, and having nominated, and by and with the advice and consent of the Senate, appointed his successor, *the accounting officers are bound to consider said removal and appointment as legal.* In cases of appointments and removals by the President, when the removal is not by direct discharge, or an express vacating of the office by way of independent fact, but merely by the operation of a new commission or appointment, then the virtue of the old commission ceases only when notice of the new commission is given to the out-going officer, either by the President or by the new officer exhibiting his commission to the old one, and he can only be paid salary to the day (inclusive) on which he received such notice. — *Washington Star.*

BURNS'S CASE. — We regret to find that the report of this proceeding has engrossed so much space in this Number. We are glad to say, however, that it is accepted by Counsel on both sides as substantially correct.

Notice of New Book.

ARKANSAS REPORTS. VOL. XIII.

We have received the 13th volume of the Reports of the Supreme Court of the State of Arkansas, published by John M. Butler, Little Rock, 1853, and containing 687 pages, being the 8th of E. H. English, the present reporter. The fact that so young a State has added thirteen volumes to the number of law books, shows that the whole number furnished by all the States must be frightfully large. This volume, as the perusal of several cases enables us to say, is creditable to the court, the reporters and printer, but not to the proof-reader. One of these cases may be interesting to the jurist and the statesman. It seems that the constitution of the State contains no provision that private property shall not be taken for public use without just compensation. The legislature, to render valuable the drowned lands ceded to it by Congress, appointed a board, and assigned to it the duty to erect embankments and dams, and dig drains, wherever they might think either expedient to effect that object, making no provision for compensating any one who might suffer damage. A landowner, alleging that an embankment, then in progress of construction, would endamage his land, prayed the Circuit Court to restrain, by injunction, the officers and servants of the State from proceeding. The Circuit Court refusing, he appealed to the Supreme Court. After a hearing before this court, the injunction prayed for was granted, on the ground that the general principles of equity and justice required that compensation should first be made or provided for, and that a clause in the Bill of Rights declared that all men have certain inherent and inalienable rights, among which are those of acquiring, possessing and protecting property, reputation, &c.

We should be glad to see a change in the mode of entitling cases. When a suit is instituted, it is usual and right to place the name of the plaintiff first — *John Doe v. Richard Roe* — and we see no reason, or no sufficient reason, why it should not always retain that position. But in many States, among which is Arkansas, if the original plaintiff pre-

vails, and the defendant appeals, the parties, or rather their names, change places in the appellate court — *Richard Roe v. John Doe*; — and so also if the suit is brought up by a writ of error. It occasions no little trouble to the student, and even to the practitioner, to fix in their minds when their acquaintance with a case begins in reading a report of it, the name of the original and true plaintiff, although told by the reporter in the statement, and they feel the necessity of continual effort to keep it there, while all the powers of their minds ought to be free to attend to the legal points and facts of the case. The practice, though of ancient date, probably originated with the clerks of courts. It is convenient for them to be able to ascertain, by a glance at their own dockets, which party entered the action and is answerable for the fees; but they might attain their object equally well by affixing a proper designation to that party's name on their dockets.

The volume is well worthy a place in a law library, in this region, inasmuch as it shows the new modes of practice prevailing there, the course of legislation, the subjects of litigation, and, to no inconsiderable extent, the manners of the people.

Insolvents in Massachusetts.

Name of Insolvent.	Residence.*	Commencement of Proceedings.	Name of Commissioner.
Atwood, Daniel C.	Natick,	June 26,	Asa F. Lawrence.
Bailey, Herbert et al.	Lowell,	" 21,	Asa F. Lawrence.
Bodwell, Joseph R.	Reading,	" 21,	Asa F. Lawrence.
Brickett, Gilman,	Boston,	" 17,	John P. Putnam.
Bridges, James A.		" 22,	Shepard Thayer.
Bridges, Orrin O.		Aug. 8, 1853,	Shepard Thayer.
Brown, James H.	Abington,	June 20, 1854,	Welcome Young
Brown, Theodore C.	Rockport,	" 19,	John G. King.
Burnell, George B. et al.	Pittsfield,	" 29,	Lorenzo H. Gamwell.
Burnham Andrew	Boston,	" 8,	John P. Putnam.
Conkey, Isaac C.	Boston,	" 26,	John P. Putnam.
Couillard, Henry	Ashfield,	" 19,	David Aiken.
Crittenden, Asaph	Conway,	" 30,	David Aiken.
Darling, Henry		Oct. 23, 1853,	Shepard Thayer.
Dillon, Weston T.	Northampton,	June 29, 1854,	Haynes H. Chilson.
Ducher, John J.		Dec. 20, 1853,	Shepard Thayer.
Edgerly, James W.	Boston,	June 19, 1854,	John P. Putnam.
Estes, Ezra B.	Lunenburg,	" 13,	C. H. B. Snow.
French, Augustus C. et al.	Lowell,	" 22,	Isaac S. Morse.
Goodman, Silas	Worcester,	" 5,	A. H. Bullock.
Goodrich, Ebenezer W. et al.	Pittsfield,	" 29,	Lorenzo H. Gamwell.
Hardy, James T. et al.	Lowell,	" 21,	Asa F. Lawrence.
Hildreth, Isaac C. et al.	Lowell,	" 22,	Isaac S. Morse.
Howard, Albert G.	Fall River,	March 31,	E. H. Bennett.
Hower, Erastus F.		Feb. 14,	Shepard Thayer.
Keley, Wm. F.	Charlestown,	June 14,	Isaac S. Morse.
Kidder, Dwight	Westminster,	" 17,	C. H. B. Snow.
Kimball, Samuel	South Reading,	" 13,	Asa F. Lawrence.
Montgomery, John P.	Pittsfield,	" 26,	Lorenzo H. Gamwell.
Merrill, Benj. F.	Walpole,	July 5,	S. B. Noyes.
Nye, George W.	Abington,	June 20,	Welcome Young.
Parker, Aaron	Rutland,	" 30,	Charles Brimblecom.
Pearson, Henry	Boston,	" 28,	John P. Putnam.
Richardson, Benj. Jr.	Lynn,	" 19,	John G. King.
Spofford, Solomon D.	Lee,	" 20,	Lorenzo H. Gamwell.
Stafford, John S.	Cummingtown,	" 3,	Haynes H. Chilson.
Stowell, Avery W.	Shutesbury,	" 12,	David Aiken.
Tarbox, Andrew L.	Lowell,	" 8,	Isaac S. Morse.
Varney, George C.	Boston,	" 1,	John P. Putnam.
Waite, Charles	Boston,	" 27,	John P. Putnam.
White, Marins	Northboro,	" 22,	A. H. Bullock.
Wilbur, Nathan	Taunton,	July 4,	Edmund H. Bennett.
Wilcox, Oliver	Lee,	June 13,	Lorenzo H. Gamwell.

* Commissioner Thayer, in his return, omits the residences of the insolvents.

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SEPTEMBER, 1854.

PRODUCTION AND INSPECTION OF DOCUMENTS.

THE following article, which we take from the English "Law Magazine" for February last, relates to a subject of general and increased interest. The statute there referred to is indeed a recent English statute,¹ but the subject is considered as it stands at Common Law also, and in Equity, and the principles developed by the decisions, whether upon the statute, at Common Law, or in Equity, may be found applicable here.

Prof. Greenleaf remarks, that "in the United States the courts have been unwilling to exercise the power [of making an order for the inspection of writings in the hands of one party to a suit, in favor of the other] except where it is given by statute." 1 Greenl. Ev. § 559. That power, however, would seem to exist at Common Law here, although hitherto sparingly exercised. And even if the courts are indisposed to use it more freely, and willing to neglect the means which may often be so effectual in eliciting truth, still the principles laid down in regard to its use at Common Law, may serve as guides in the construction of statutes. In some of the United States, enactments have been passed in relation to this subject. The Massachusetts Stat. 1852, c. 312, § 61, provides, that "In all civil actions the plaintiff may at any time after the entry of the action, and the defendant at any time after answer, or, if it be a real or

¹ 14 & 15 Viet. c. 99, § 6.

mixed action, after plea, and before the case is opened to the jury, file in the clerk's office interrogatories for the discovery of facts *and documents* material to the support or defence of the suit, to be answered on oath by the adverse party ;" and subsequent sections make further provisions in regard to this proceeding. This act is more extensive than the English statute. How far the general principles of the law of discovery in equity are applicable under it, we shall not now consider. To a great extent we presume they are so.

And see Conn. Rev. Stat. 85 ; N. Y. Rev. Stat. 547 ; Sec. 388 of the Code ; 1 Swan's Rev. Stat. of Ohio, Derby's Ed., 668. We have not examined the statutes of all the States, to see how general such enactments may be. It is sufficient that such a jurisdiction exists in some, by common law or statute, or both.

For decisions under the statute of Massachusetts, above referred to, or the previous Act of 1851, see the following cases. *Hand v. Hughes*, 14 Law Rep. 393 ; *Johnson v. Kidder*, and *Krebs v. Pfaff*, Ib. 394 ; *Millets v. Lilley*, Ib. 455 ; *Fowle v. Gardner*, Ib. 456 ; *Clafflin v. Corbett*, Ib. 517 ; *Howard v. Richardson*, and *Howe v. Brigham*, Ib. 574 ; *Adams v. McEnany*, and *Long v. Whitney*, Ib. 575 ; *Tuckerman v. Sewall*, 15 Law Rep. 111 ; *Brigham v. Peters*, Ib. 638 ; *Fifty Associates v. Tudor*, Ib. 639 ; *Sheldon v. Kendall*, 16 Law Rep. 41 ; *Townsend v. Gibbs*, Ib. 410.

And in addition to the English cases cited by the writer in the Law Magazine, see *Doe d. Roe*, 16 Eng. Law & Eq. 202 ; S. C. 1 El. & Bl. 279 ; *Summerfield v. Prichard*, 17 Eng. Law & Eq. 492 ; S. C. 17 Jur. 361 ; *Scott v. Walker*, 22 Eng. Law & Eq. 134 ; S. C. 2 El. & Bl. 555.

INSPECTION OF DOCUMENTS.

" Whenever any action or other legal proceeding shall henceforth be pending in any of the superior courts of Common Law at Westminster or Dublin, or the Court of Common Pleas for the county palatine of Lancaster, or the Court of Pleas for the County of Durham, such court, and each of the judges thereof, may respectively, on application made for such purpose by either of the litigants, compel the opposition party to allow the party making the application to inspect all documents in the custody and under the control of such opposite party relating to such action or other legal proceedings, and if necessary, to take

examined copies of the same, or to procure the same to be duly stamped, in all cases in which previous to the passing of this Act a discovery might have been obtained by filing a bill or any other proceeding in a Court of Equity at the instance of the party so making application as aforesaid to the said Court or Judge."

Since the abolition of special demurrers, probably no justification is needed for choosing a section of an Act of Parliament as the subject for a "Leading Case;" but if our readers should deem us not within strict bounds in doing so, we must call to our aid the extensive powers of amendment now existing, and in place of the enactment substitute the case of *Hunt v. Hewett*, 21 Law J., N. S., Exch. 210.

There are few who will read this case but who are well aware that before the passing of the statute a power at Common Law to compel inspection of documents existed in our Common Law Courts; and that a still greater power existed in the Courts of Equity, by means of what is termed a bill of discovery.

We propose in this paper briefly to consider —

1. What was the power of compelling inspection of documents existing at Common Law.

2. The power in Equity by bill of discovery.

3. To notice the cases on the subject decided since the passing of the above enactment.

- I. The compelling inspection at Common Law, which was long since fully recognized, see *Jevens v. Harridge*, 1 Wms. S. 8 b., seems to have proceeded on two grounds. First, in extension of the practice as to *profert* and *oyer*, the Courts would compel an opportunity of inspection of any documents set forth and relied upon by either party in his pleadings, but which were not of such a nature as to require *profert*, Steph. Pl. 5th ed. 486, 487. Thus, in an action brought upon a bill of exchange or promissory-note, *Woolmer v. Devereaux*, 2 M. & Gr. 758, on a policy of insurance, *Goldsmidt v. Marryatt*, 1 Camp. 562, or on a written agreement, *Thomas v. Dunn*, 6 M. & Gr. 274, a judge at chambers will make an order for the inspection of the instrument declared upon. So where the plaintiff brought an action for breach of an agreement to employ him to the end of the year, defendant pleaded that there was no memorandum in writing as required by the Statute of Frauds; the plaintiff replied that there was such a writing, and it was held, that he was bound to permit an inspection of it, although

it consisted only of a letter from defendant's agent. *Blogg v. Knapp*, 6 Bing. 614. See also *Bluck v. Gompertz*, 21 Law J., N. S., Exch. 25. The order for inspection would not, however, be made as a matter of course, but circumstances should be shown by affidavit to a judge at chambers entitling the applicant to the inspection of the instrument. *Woolmer v. Devereux*, 2 M. & Gr. 758.

But apart from this *quasi oyer*, there was a more extensive power of compelling inspection, which was exercised when the person seeking the order could show, 1st, that he was a party to a pending suit; 2dly, that the inspection of the document was necessary for supporting the case of the applicant in that suit; 3dly, that he or the person through whom he directly claimed was a party to the document sought to be inspected; 4thly, that such document was in the possession or under the control of the opposite party; and, 5thly, that the party having the possession of the document held it as trustee or agent for the applicant.

In order to bring the application within the first and second of the above rules it was necessary to show that the inspection was required for the *bonâ fide* purpose of supporting or defending an action. Thus it has been refused where the object of it was to plead a plea in abatement for non-joinder, *Beal v. Bird*, 2 D. & R. 419; also, where a plaintiff sought to inspect and take a copy of a deed merely for the purpose of arguing a rule for a new trial, *Wood v. Morewood*, 2 Scott, N. R. 204; S. C. 9 Dowl. P. C. 44. And in all cases, where the application was what is termed "a mere fishing application;" that is, for the purpose of discovering the case of an opponent, or whether a certain document was or was not in his possession, the courts have in all instances refused to order the inspection. Thus in the case of *The Birmingham, Bristol, and Thames Junction Railway Company v. White*, 1 Q. B. 282, the Court refused to grant inspection of the books of the company to the defendant, as he thereby sought to discover a defence and not to support any particular plea. But in *Woolmer v. Devereux*, 2 M. & Gr. 758; S. C. 8 Scott, N. R. 224, Tindal, C. J., laid it down that a party ought to be permitted to inspect an instrument, on showing by affidavit that it had been forged or altered since it was signed, or that the applicant had no recollection of ever having executed such a document.

As stated above, it was necessary that the applicant should be a party to the document sought to be inspected; but the word "party" is not to be taken as meaning in all cases an instrumentary party, for being a party to it by interest brings the applicant sufficiently within the rule, *Bateman v. Phillipps*, 4 Taunt. 177; *Browning v. Aylwin*, 7 B. & C. 204, and privity of estate, as in the case of an assignee, would be sufficient. And in a recent case, where ejectment was brought to recover certain premises upon the ground of a forfeiture by reason of breaches of covenant contained in two leases, the tenant in possession, who was admitted to be in lawfully, but by what instrument or for what estate was not shown, applied to inspect the leases under which the forfeiture had accrued. The court held that an order to inspect was well made, Lord Campbell saying, "The action is founded upon two leases, the title of the lessors of the plaintiff being rested on a forfeiture by reason of breaches of the covenants in these leases. It was, therefore, necessary to show that the defendant held under such leases, and was in possession of the premises in such a manner as to be affected by the breaches of covenant. The defendant appears to have asserted that he was lawfully in possession, and that was not denied. We must therefore assume that he derives the title under the leases. It is the same as if an action of covenant had been brought by the lessors of the plaintiff against him as assignee of the lease for breaches of covenant, and in that case the court certainly could order an inspection under its Common Law jurisdiction. If so, ought we not, with equal justice, to order an inspection in this action of ejectment, which is brought to turn the defendant out of possession? It is an action founded on two deeds, and it is but fair that the party against whom the action is brought should have an inspection of the deeds, in order that he may see whether or not he has any answer to the action. In the exercise of the Common Law jurisdiction of the court, I think the order was properly made." *Doe d. Child v. Roe*, 22 Law J., N. S., Q. B. 102.

But the interest must be certain and clear, and not a mere claim. *Cocks v. Nash*, 3 M. & Scott, 164; S. C. 9 Bing. 723.

As a general rule the courts would only exercise the power of compelling inspection as against a party to the suit, but in the case of *White v. The Earl of Montgomery*,

2 Str. 1198, the Court of Queen's Bench made an order upon a third person to give *oyer* of a deed to the defendant, and also to produce it at the trial if required by the plaintiff; but the circumstances under which the third person held the instrument are not stated in the report, and the case seems to have been in no way supported by the general course of practice. Yet if the party opposing the application had not the actual possession, but had legitimate control over the person in whose custody the instrument sought to be inspected was, that would have been sufficient to entitle the applicant to the order; and in an action by lessor against lessee, the court compelled the mortgagee of the lessee to inspect and take a copy of the lease. *Doe d. Morris v. Roe*, 1 Gale, 367.

The most important requisite to support the application is the fifth of the above rules, viz., that the party holding the instrument did so as trustee for the applicant; this, however, is but an extension of the third rule, or rather, the third is an almost necessary ingredient of the fifth. The courts, too, seem to have been jealous that this rule should be fully maintained. Thus in *Goodliff v. Fuller*, 14 M. & W. 4, which was an action for a breach of promise of marriage, all the letters which had passed between the plaintiff and defendant had been mutually returned; the defendant alleged that by two of the letters which the plaintiff had written to him, and which he had returned to her, she had released him from his promise: the court held that the plaintiff did not hold the letters as trustee for the defendant, and refused to make an order on the plaintiff to produce them for the inspection of the defendant. So in an action on certain bills of exchange, the defendant pleaded that he was liable as a surety only, and that time had been granted by deed to the principal. On motion for a rule to show cause why the plaintiff should not produce that deed, the court held that the defendant had no interest in the deed so as to cause the plaintiff to hold it as trustee for him, and refused the rule. *Smith v. Winter*, 3 M. & W. 309. So the Court of Common Pleas would not compel a defendant to produce certain bills of exchange, on which the action was brought, and which were set out in the plaintiff's declaration in order that he might inspect or take copies of them on an affidavit by the plaintiff, stating that the defendant had obtained them from him by undue and fraudulent means,

and which the defendant by affidavit denied in general terms, on the grounds that the plaintiff should have shown by what means the defendant became possessed of them, and that the remedy was by action of trover. *Threlfall v. Webster*, 1 Bing. 161. And where the plaintiff had declared upon a lease, of which he had neither the original, counterpart, nor copy, and the attorney who had drawn the lease and counterpart had absconded, the court refused to order the defendant, who had the lease in his possession, to permit a copy of it to be taken. *Lord Portmore v. Goring*, 4 Bing. 152.

But where an annuity-deed was prepared by R. as agent both of the grantor and grantee, and there being no counterpart, the deed was left in the hands of R., who received, and for several years paid over to the grantee, the amount of the annuity. R. ultimately absconded, and the deed came into the possession of the grantor, on his redeeming the annuity two years after it was granted. In an action by the grantee against the grantor for the arrears of the annuity, the court permitted the plaintiff to inspect and take a copy of the deed, to enable him to declare therein, although it was sworn by the defendant that R. was the agent of the plaintiff alone. *Daverner v. Bouverie*, 1 M. & Scott, 29. And in *Reid v. Coleman*, 2 Cr. & M. 456, it was laid down as a general rule, that where there was an agreement between plaintiff and defendant, of which there was only one part in existence, the party who has the agreement in his possession ought, when applied to, to give a copy to the other party. See also *Doe d. Morris v. Roe*, 1 Gale, 363; *Charnock v. Lumley*, 5 Scott, 438.

As to the right of an allottee of shares to inspect the books of an inchoate company in an action against a provisional committee-man for a deposit, see *Ley v. Barlow*, 17 Law J., N. S., Exch. 105; and as to the books of a sworn broker, under 7 Geo. 2, c. 8, s. 9, see *Pritchett v. Smith*, 18 Law J., N. S., C. P. 211, in which case Wilde, C. J., says: "The only class of cases in which this court interferes to oblige one party to a suit to grant his opponent an inspection of documents, which he alleges are necessary for his defence are, when the party applying for inspection has an interest in the document he wishes to see. Thus, where two parties have signed an instrument in mutual confidence, and that instrument has been left in good faith in the possession of one of them, who refuses to produce it

when called upon, in such a case the Court of Equity would interfere to grant relief, and so will this court. So when one party holds papers as trustee for the other, an order will be made for their production."

Such, then, being the power of the Common Law Courts, we will now glance briefly at that of the Courts of Equity.

II. Strictly speaking all bills in equity are bills of discovery; but the expression "bill of discovery" has by usage acquired a technical signification, whereby it has reference peculiarly, if not exclusively, to those bills which seek no relief, or rather no other relief than a disclosure of all such facts, and a production of all such documents, as lie within the knowledge, power, or control of an opposing party to any suit or action already instituted, or liable or likely to be instituted, in some other court. Though, not perhaps digressive, it might well be considered unwarrantable to devote any portion of this case to a sketch of the origin and history of these bills; it will be sufficient for our purpose, which is a practical one, to explain their connection with the Common Law, the circumstances which give rise to their necessity, and under which the benefit sought to be attained by them is granted.

As the enactment upon which we are now treating has extended the authority of the Courts of Common Law so as, in certain cases, to grant to those courts concurrent jurisdiction with Courts of Equity, the observations now made upon bills of discovery must be regarded independently of this statute, and as though it had not been enacted. It will also be sufficient for our present purpose to confine our remarks upon bills of discovery to those cases where actions at law have been actually commenced, without regard to those cases where such actions are in contemplation merely, inasmuch as the benefit of this statute only extends to the former cases of actions pending. The reader must conceive an action at law to have commenced, and one of the litigant parties to be justly apprehensive that his cause will be improperly prejudiced as regards its true and substantial merits by the absence of certain facts or documents which he believes to exist, and further to lie within the knowledge or control of his opponent. It was not within the province of the Courts of Common Law (except in cases alluded to under our first division of this subject) to put a party in possession of such

information as he desired to obtain by a disclosure of facts and production of documents. Recourse was therefore had to equity in the following manner:— The party desiring such information filed a bill in equity between himself and his opponent, in which in order to obtain the assistance of equity he was required to show that he was entitled to such assistance, and if not successfully resisted by his adversary the court would treat the action for all the purposes of disclosure and production as though it had been originally instituted in equity, and would, if necessary, restrain legal proceedings till such purposes had been carried out. To make out such a case as to induce the court to assume a jurisdiction in the matter it must appear clearly upon the face of the bill:—

1. That the discovery sought is material to some other suit actually commenced. (We have already stated that it will be unnecessary to speak of actions in probability only.) The allegations must therefore show that the plaintiff and defendant are actually engaged in litigation in some other court, and that the discovery is material to assist him in proof or in aid of proof in such existing suit.

2. That the plaintiff seeks the discovery for the purpose of supporting his own case, and not merely of opposing that of the defendant.

3. The purposes for which the discovery is sought must clearly be shown by the allegations; in order that the court may judge of the materiality of the discovery.

4. Superadded to the above positive requirements, the bill must not be suggestive of its own dismissal by showing upon its face any of those grounds of objection to it which are valid when taken advantage of by way of demurrer or plea. The following will be found to include the principal objections to such a bill:—

1. Want of jurisdiction.

This objection may be taken when the court in which the original suit is pending is competent to grant the relief prayed for in equity, or when the controversy is before arbitrators. Equity will, however, assist the proceedings of a court in a foreign country in amity with that where the bill is filed.

2. Want of interest in the plaintiff or defendant, as where plaintiff is heir apparent only; or where defendant is a witness only, and has no interest in the suit.

3. Want of privity between plaintiff and defendant ; as where plaintiff is heir-at-law in fee simple and defendant devisee, in which case if plaintiff cannot set the will aside he has nothing to do with the deeds.

4. Want of parties ; as where the plaintiff has a title or the defendant is liable conjointly with some other party not before the court.

5. The discovery might subject defendant to penalties or a forfeiture. This is no ground of objection where plaintiff is the only person having a right to take advantage of the penalty or forfeiture, and he offers to waive his claim ; but is valid where a third party possesses this right.

6. The discovery relates to the defendant's title. No party is allowed to pry into his adversary's title to discover a defect, but must prevail by the strength of his own.

7. The defendant has an equal right in common with the plaintiff, to the subject-matter in dispute ; as where defendant is a purchaser for value without notice of plaintiff's claim.

8. The discovery might subject the defendant to punishment as upon a criminal prosecution ; or to the consequences of a supposed crime, as in respect of forged deeds ; for it is contrary to the genius of the Common Law to compel a party to accuse himself. These are the principal grounds of objection to a "bill of discovery ;" but there are other grounds common to all bills, and indeed to all suits, whether at law or in equity, and which for that reason, it is unnecessary to particularize here. Such objections might be, and would be, dealt with upon the institution of the original suit.

The above enumerated objections have equal application to facts within the defendant's knowledge, and to documents within his power or control. Both are guarded by the same protecting privileges, — both are liable to the same disclosure ; therefore, the observations we have made as to discovery generally, may be strictly applied to the production of documents alone, which is more nearly allied to our present subject, the inspection of documents.

The inspection of documents being a right incident to their production, all that has been said upon this latter head may be referred with equal strictness to the former ; for wherever a plaintiff has a right to the production of a deed,

he has an equal claim to inspection, and to take copies of the same.

III. The cases which have been decided since the passing of the statute have drawn a broad distinction between its powers and those of a bill in equity in this, that there is no power under the statute to discover any document, but only to inspect it when known and designated to the court. Thus, in the case of *Rayner v. Allhusen*, 21 Law J., N. S., Q. B. 68, which was an action for goods sold, the defendant applied for an order to inspect the plaintiff's books, containing any entry, memorandum, or minute relating to the sale, and also that the plaintiff should be required to state, upon oath, whether he had any, and if so, what books and documents referring to the matter in question. The court refused the latter part of the application as not being within the statute, but granted it so far as related to the books and documents having reference to the trial only, at the same time saying, that there was no power to inspect the books of an opponent generally in order to discover evidence. So in the case of *Galsworthy v. Norman*, 21 Law J., N. S., Q. B. 70, an application by defendant to inspect all journals, day-books, ledgers, and other books containing entries, and all documents, relating to a certain action, was refused in part, but granted to the extent that the plaintiff should produce all papers and documents in his possession or under his control, relative to such action, Erle, J., in delivering judgment, saying: "It has been contended, in a previous application under this Act of Parliament, that the affidavit of the applicant should allege, affirmatively, that there are papers in the opponent's possession relative to the question in issue, and that the other side should thereupon be called to swear whether there are such papers, and whether they are or are not in his possession, and to specify what they are. I have consulted my learned brothers on this matter, and we are of opinion that the statute does not entitle us to take the course suggested, which would be in effect to permit the applicant to file a bill of discovery." And this doctrine was fully supported by the cases of *Sneider v. Mangino*, 21 Law J., N. S., Exch. 121, and *Pepper v. Chambers*, 21 Ib., Exch. 81, where Pollock, C. B., says: — "The object of this statute is to compel production of what is material at the trial, not to obtain information

whether it is material or not." The extent to which the applicant will be assisted by an opportunity of discovery, as well as inspection, is well defined in the cases of *Scott v. Walker*, 22 Law J., N. S., Q. B. 404. That was an action brought to recover a certain deed made between the plaintiff of the first part, and one R. P. of the other part. The defendant pleaded first *non-detinet*; secondly, that the deed was not the property of the plaintiff; and, thirdly, a lien for work done by the defendant as attorney for plaintiff. It appeared from the affidavits that the deed in question was a mortgage-deed, whereby R. P. assigned to the plaintiff all claims and demands of him, R. P., against the Great Western Railway Company, for recovery whereof an action had been brought, which had become the subject of a reference which was then pending. The point in dispute was, whether the services which caused the lien were rendered to the plaintiff or to R. P. The plaintiff's affidavit stated that the said defendant's day-books, bill-books, cash-books, letter-books, ledgers, and journals, commencing the 11th of July, 1848, down to and including the 17th of May, 1853, and from which books, some or one of them, the bill of costs had been made, would, as the deponent verily believed, show that the said R. P. was the real debtor to the defendant, and not the plaintiff; and the deponent verily believed that all, or some, or one of the said books would furnish material evidence in support of his the plaintiff's case, and that the inspection of such books during the period aforesaid, was material and necessary for the support of his the defendant's action, and that the same would show that the defendant never did any part of the work causing the lien for the plaintiff, but for R. P. The court held this affidavit insufficient to obtain the rule in its terms, but made it absolute as to part. Lord Campbell laid down and applied the rule as follows: "The rule ought not, I think, to be made absolute in its terms, which are a great deal too large. In its present form, the application is a fishing one, which is always to be resisted. But upon the whole, I think the rule ought to be made absolute as to part. Where a defendant has in his possession a document which does not constitute his own case, but which will either make out the plaintiff's original case, or answer the case set up by the defendant, I think the plaintiff is entitled to an inspection of the document. He is not entitled to see that which is to make out

the defendant's case, any more than the defendant to see that which is to make out the plaintiff's case; but if either party has a document which makes out the case of the opposite party, that is a case in which an inspection ought properly to be granted. Here, so far as regards the inspection of the books relating to the particulars delivered as the foundation of the lien relied upon by the defendant, I think it ought to be made absolute. . . . Where the application is merely a fishing one, it ought not to be granted; but if it reasonably appears from the affidavits that a document is in possession of one party, which is material to the case of an opposite party, an inspection of that document should be allowed. Confining this rule to any extract or entry in the defendant's books respecting the particulars which have been delivered in the action by R. P. against the Great Western Railway Company, I am of opinion that it should be made absolute."

The leading case, *Hunt v. Hewett*, was an action on a surveyor's bill. The defendant made an application to inspect the plaintiff's books of business, containing any entries in relation to the subject of the action, and also all plans or documents relating thereto, for the purpose of ascertaining whether the charges were reasonable, and also to whom credit was given, both of which matters were put in issue by the defendant. The judgment of the Court of Exchequer contains so clear an exposition of the whole subject, that we shall insert the greater portion of it in full:—

"It seems to us to be clear from the words of the section, that the Legislature never intended to give the Courts of Common Law power to compel a discovery by a bill of analogous proceeding. The only power given is to allow, not a discovery, but an inspection by one litigant party of the documents in the custody or under the control of the opposite litigant party, with certain restrictions or limitations. First, there must be a suit or proceeding pending; secondly, the documents must relate to such action, suit, or other proceeding; and, thirdly, the cases in which inspection is to be granted must be such as those where inspection could be obtained by filing a bill for discovery or proceeding in a Court of Equity at the instance of the same party. All that is said on the subject of discovery is by way of limitation or description of the subject of inspection. We think this question has been put on the right footing by Mr. Charles Pollock, in his 'Treatise on Discovery,' pp. 9, 10; and there is a decision of my brother Erle in *Galsworthy v. Norman*, 21 Law J., Q. B. 70, after consulting the other judges of the Queen's Bench, that the courts of law have no power of compelling a discovery, and this court, on one or two occasions, has intimated its opinion to the same effect. *Pepper*

v. *Chambers*, 81 Law J. Exch. 81. In order to accomplish the object of obtaining such inspection of documents, as there is no power to entertain a bill of discovery or any analogous mode of proceeding in Courts of Common Law, the old mode of obtaining inspection of documents in the hands of the opposite party must be adapted to it. It had been usual for the courts, in the exercise of their equitable jurisdiction, to grant such inspection, first, as a substitute for oyer, which at Common Law applied to some instruments only, and by usage the power of inspection was, with certain conditions, extended to all; secondly, upon the equitable principle, that the *cestui que trust* had a right to oblige his trustee to give an inspection, the courts of law always compelled it where they could consider the party as holding the documents under an express or implied trust for the applicant. In the former case an affidavit, generally speaking, was unnecessary; in the latter it was required, unless the facts were admitted in the statement of the applicant's attorney, a course usually adopted at chambers to save expense. The old mode of obtaining inspections ought to be adopted under the new Act of Parliament, with such alterations as the nature of the case requires. Under the recent Act of Parliament, where an inspection is litigated, an affidavit will, no doubt, be necessary as to all the disputed facts; and if all are disputed, the affidavits ought to state a sufficient case in all respects to entitle the party to inspect as would have been necessary to obtain an inspection, which the court had before, and still has, the power to grant at Common Law. The affidavit, therefore, ought not only to show that an action or proceeding is pending, but also to state, not a mere suggestion, but circumstances sufficient to satisfy the court or judge that there are in the possession or under the control of the opposite party certain documents, and that those relate to such actions or other legal proceedings. A *prima facie* case, calling for an answer, must, at least, be laid in this respect, as it must in the old proceeding to obtain inspection of documents held by a trustee. Further, the affidavit must show that the applicant would, by a bill of discovery or other proceeding, be able to obtain a discovery and inspection of those documents. Under the last head we must follow the rules established in Courts of Equity, within which every plaintiff must bring himself, in order to obtain an inspection by bill of discovery; and therefore if the facts be disputed the affidavits ought to state all that a plaintiff in equity must state, in order to entitle himself to a discovery and inspection. Whatever difference there may be with respect to some points in the law of discovery, for instance, as to the mode of pleading in equity to raise the objection on the part of the defendant, the general principles as laid down are free from doubt, and are fully explained in the able treatises of Sir James Wigram, Mr. Hare, and the little work published by Mr. Charles Pollock. The right of a plaintiff in equity is limited, first, to a discovery confined to a question in that cause; secondly, to such material documents as relate to the proof of the plaintiff's case on the trial. It does not extend to the discovery of the manner in which the defendant's case is to be established, or to evidence which relates exclusively to this case. The party applying, therefore, who is in the same situation as a plaintiff in equity, must show, first, what is the nature of the suit, and of the question to be tried in it; and it seems also that he should depose in his affidavit to his having just ground to maintain or defend it. Secondly, the affidavit ought to state with sufficient distinctness the reason of the application and the nature of the documents, in order that it may appear to the court or judge that the documents are asked for, in order to enable the party applying to support his case, not to find a flaw in the case of the opponent, and also that the opponent may admit or deny the possession of them. To this affidavit the

opponent may answer by swearing that he has no such document, or that they relate exclusively to his own case, or that he is for any sufficient reason privileged from producing them; or he may submit to show parts, covering the remainder, on an affidavit that the part concealed does not in any way relate to the plaintiff's case. The same course would be pursued in equity. Although the recent Act of Parliament has not given the courts of law a direct power of compelling the production of documents, and in that respect they are not so effective as Courts of Equity, they have, in truth, nearly as great a power given under the section in question; for it will rarely happen where documents material to the issues are really in the hands of the opposite party that there will not be sufficient circumstances known to the applicant to constitute a *prima facie* case for him, and to justify the interference of the court or a judge, if no answer is given to them by affidavit. The new measure will, therefore, in practice be nearly as effective as if the power of compelling the discovery were expressly given to the Common Law Courts. It remains to apply these observations to the affidavit in question. It does state the question and ground of defence, namely, that the work was never done; that if done, it was charged at too high a rate; and, further, that it was done on the credit of another, not the defendant. The defendant's case is, therefore, of a negative character. He does not seek to have the evidence by which the plaintiff supports his case, for the journal or day-book would not be evidence for the plaintiff. The defendant in support of such a case has a right to a discovery on the principle of the case, *Smith v. The Duke of Beaufort*, 1 Ph. 209; but so far as relates to the discovery of the journal as evidence in support of the defendant's case, that the credit was given to another, the affidavit is defective, as it does not deny that the opponent was authorized to bind the defendant by his contract; and if he was, it was wholly immaterial whether credit was given to him in the plaintiff's journal or day-book; but the book must be inspected to see if there be any entry, and if any, what price is therein charged as the value of the works. The rule will therefore be absolute."

To bring the application within the provisions of the statute, it seems sufficient to show, 1st, that there is a suit pending; 2dly, that the documents sought for relate to such suit; 3dly, that the circumstances necessary to maintain a bill in equity exist. The extension of the Common Law power to grant inspection is obvious. It is unnecessary to show the existence of the 3d and 5th requisites at Common Law as given above. It is now unnecessary that the applicant should be a party to the instrument sought to be inspected; neither need the opposite party holding the instrument do so as trustee for the applicant. But yet the party applying must have a certain interest in the contents of the document so far as this, that they must afford evidence in support of his case, and not merely an answer to his opponents. *Doe d. Avery v. Langford*, 21 Law J., N. S., Q. B. 217. What the documents are he seeks to inspect, and in what manner they will aid his case, must clearly appear from the affidavits used in support of the application. *Doe d. Avery v. Langford*.

On points of practice relating to inspection, it has been decided that the costs of obtaining the order of inspection are costs in the cause; but that the costs of the inspection itself should be borne by the party making it. *Hill v. Philp*, 21 Law J., N. S., Exch. 82. Also that a particular place where the document is to be inspected should be named in the rule. *Rogers v. Turner*, 21 Law J., N. S., Exch. 8.

NOTES TO LEADING CRIMINAL CASES.

HULL'S CASE, Kelyng's Rep. 40, A. D. 1664.

Murder — Manslaughter — Misadventure.

"In the sessions in the Old Baily, holden the 13th of January, 1664, one John Hull was indicted for the murder of Henry Cambridge; and upon the evidence, the case was, that there were several workmen about building of a house by the horse-ferry, which house stood about thirty foot from any highway or common passage, and Hull being a master-workman (about evening when the master-workman had given over work, and when the laborers were putting up the tools,) was sent, by his master, to bring from the house a piece of timber which lay two stories high, and he went up for that piece of timber, and before he threw it down, he cried out aloud, stand clear, and was heard by the laborers, and all of them went from the danger but only Cambridge, and the piece of timber fell upon him and killed him: and my Lord Chief Justice Hyde held this to be manslaughter, for he said he should have let it down by a rope, or else at his peril, be sure nobody is there. But my brother Wylde and myself held it to be misadventure, he doing nothing but what is usual with workman to do: and before he did it, crying out aloud, stand clear, and so gave notice if there were any near they might avoid it; and we put the case, a man topping a tree, and when the arms of the tree were ready to fall, calls out to them below, take heed, and then the arms of the tree fall and kill a man, this is misadventure, and we shewed him Poulton de pace, 120, where the case is put, and the book cited, and held to be misadventure; and we said this case in question is much stronger than the case where one throws a stone or shoots an arrow over a wall

or house, with which one is slain, this in Kelloway, 108 and 136, is said to be misadventure. But we did all hold that there was a great difference 'twixt the case in question, the house from which the timber was thrown standing thirty foot from the highway or common footpath, and the doing the same act in the streets of London; for we all agreed, that in London, that if one be a cleansing of a gutter, call out to stand aside, and then throw down rubbish, or a piece of timber, by which a man is killed, this is manslaughter; being in London, there is a continual concourse of people passing up and down the streets, and a new passenger, who did not hear him call out, and therefore the casting down any such thing from a house into the streets, is like the case where a man shoots an arrow or gun into a market-place full of people, if any one be killed it is manslaughter; because in common presumption his intention was to do mischief, when he casts or shoots any thing which may kill among a multitude of people; but in case that an house standing in a country town where there is no such frequency of passengers, if a man call out there to stand aside, and take heed, and then cast down the filth of a gutter, &c., my brother Wylde and I held that a far differing case, from doing the same thing in London. And because my Lord Hyde differed in the principal case, it was found specially; but I take the law to be clear, that it is but misadventure."

In a former note, (see Law Rep. for May last, p. 35.) it was stated that to render any act criminal, it must be done with criminal intent; but that such criminal intent might be, and generally should be, inferred from any wanton or reckless conduct which resulted in an injury to another's rights. For as every one is by law presumed to intend the natural and ordinary consequence of his acts, if therefore he is guilty of that degree of negligence which naturally and ordinarily leads to a certain result, he must be considered to have actually intended such result, and he is criminally responsible, as justly as if his conduct proceeded from actual malicious motives. Accordingly we find it a well established principle of criminal law, that if injuries are caused to a person's life or health, by acts which, if *wilful*, would be punishable as crimes, the offender cannot screen himself from criminal responsibility, under the plea that such injury was caused by his negligence merely, and without positive malicious motive. The *degree* of the crime may not be the same as if the act was done with actual malice, but the character of a crime still remains, and the perpetrator is liable to be arraigned at a criminal bar.

The care of the common law for the life of every subject, and the necessity of care and watchfulness on the part of those in whom confidence is placed, is well illustrated by the case of *Rex v. Carr*, tried at the Old Bailey, in 1832, before Mr. Baron Bayley, Justice Patteson, and

Baron Gurney, on an indictment for manslaughter. The prisoner was an iron founder, and was employed to cast some cannon. One of them, on being fired, burst, and was sent back to be recast. Instead of recasting it the maker filled up the hole with lead, and returned it. On being again fired, it burst the second time, and killed the deceased. After a full hearing the prisoner was convicted of manslaughter.

The fatal result in the above case might, and perhaps would, in common parlance, be called an *accident*, but the common law seeks to prevent the recurrence of such accidents, by punishing him who is the direct and negligent author thereof. In like manner, in *Rex v. Burton*, 1 Strange, 481, as early as 1732, it was ruled to be manslaughter when a person came to town in a chaise, and before he got out, he fired his pistols, which by accident (as the report goes) killed a woman. Still stronger is the case of *Tessymond*, in 1828, who was apprentice to a chemist, and who being applied to for a vial of paregoric, delivered laudanum in its stead. The laudanum was administered to a child, which caused its death. The vial was also labelled "Paregoric." The chemist swore that in his shop the laudanum bottle and the paregoric bottle stood side by side, and that a person not very conversant might mistake the one for the other. The apprentice was however convicted of manslaughter, Bayley, J. saying to the jury, "If a party is guilty of negligence, and death results, the party guilty of the negligence is guilty of manslaughter." 1 Lewin, C. C. 169.

Still another illustration occurs in the same volume. A wine merchant was raising a cask of wine to an upper story of his building, by a sling around the centre of the cask only. When the end of the cask touched the floor of the fourth story, it slipped from the sling, and killed two females passing under it at the time. He was tried and convicted of manslaughter, it being found a careless way of raising the cask, and that a safer way was in common use. *Rex v. Rigmaldon*, 1 Lewin, C. C. 180.

Perhaps the most frequent instances of criminal negligence which have been made the subject of prosecution, are cases of negligence in driving horses, or in managing vessels. The exact degree of negligence which is necessary, in order to create a criminal responsibility, is not defined with perfect accuracy, but it has generally been called *gross negligence*, meaning, perhaps, the same as the same words in speaking of civil liability.

Rex v. Timmins, 7 Car. & P. 499, A. D. 1836, is one of these cases. There two omnibuses were racing, by which one was upset, and an outside passenger was thrown off and killed. The defence was, that the horses driven by the prisoner took fright and ran away. PATERSON, J. in summing up, said, "The question here is, whether you are satisfied that the prisoner was driving in such a negligent manner, that by reason of his gross negligence he had lost the command of his horses." Again, "The main questions are, were the two omnibuses racing? and was the prisoner driving as fast as he could, in order to get past the other omnibus? and had he urged his horses to so rapid a pace that he could not control them? If you are of that opinion, you ought to convict him; but if his horses ran away of their own accord without any act of his, he is entitled to an acquittal."

But in another case, in the same volume, the negligence of the prisoner could hardly be called *gross*; yet he was, under the direction of Gurney, B., and WILLIAMS, J. found guilty of manslaughter. In this case the prisoner was a lad, but of what age does not appear, and in a frolic, and without intention of doing harm to any one, pulled the trap-stick out of the front part of a cart, in consequence of which it was upset while loading, and the cartman, who was in it, pulled in a stick of potatoes, was pitched backwards on the stones and killed.

Neither does there appear to have been very gross negligence in *Rex v. Groul*, 6 Car. & P. 629, A. D. 1834. The prisoner was charged with the manslaughter of William Monk. "A foot passenger" — we copy the marginal note — "was walking at lamplight in the carriage road along a public highway, when the owner of a cart, who proved to be near-sighted, drove along at the rate of eight or nine miles an hour, sitting at the time on a few sacks laid in the bottom of the cart, and ran over the foot passenger and killed him." BOLLAND, B., in summing up, told the jury *inter alia*, that there was no doubt on the evidence that the life of the deceased was taken away by the act of the prisoner, and the question for their consideration would be, whether the person having the care of the cart, and being a near-sighted man, conducted himself in such a way as not to put in jeopardy the lives and limbs of his Majesty's subjects. If they thought he had conducted himself properly, they would say he was not guilty, but if they thought that he acted carelessly and negligently, they would pronounce him guilty of manslaughter.

In *Rex v. Knight*, 1 Lewin, C. C. 168, A. D. 1828, the prisoner being indicted for manslaughter, "the evidence was, that being employed to drive a cart, he sat in the inside instead of attending at the horse's head, and while he was thus sitting, the cart went over a child who was gathering up flowers in the road. Per BAYLEY, J.: The prisoner, by being in the cart instead of at the horse's head or by its side, was guilty of negligence; and death having been caused by such negligence, he is guilty of manslaughter."

The necessity of more than mere negligence, seems to have been the opinion of PARKER, J. in *Rex v. Rigmaidon*, 1 Lewin, C. C. 180, A. D. 1833, where the prisoner "was indicted for manslaughter in having by negligence in the manner of slinging a cask or puncheon, caused the same to fall, and kill two females who were passing along the causeway. It appeared in evidence, that these were the modes of slinging casks customary in Liverpool.

"Per PARKER, B. to the jury: 'The double slings were undoubtedly the safest mode; but if you think the mode which the prisoner adopted, viz., that of single rope, was reasonably sufficient, you cannot convict him.'"

And in *Rex v. Allen*, 7 Car. & P. 154, A. D. 1835, it was held, that a greater degree of negligence was necessary to create a criminal liability than in civil cases.

In *Regina v. Dalloway*, 3 Cox, 273, A. D. 1847, the driver of a cart was indicted for running over a child in the street, and causing its death. The prisoner was standing up in a spring cart drawn by one horse, which was trotting down the slope of a hill. The reins were not in the hands of the prisoner, but loose on the horse's back. The child ran across the street a few yards before the horse, and one wheel knocked the child down and killed it. It did not appear that the prisoner saw the child in the road before the accident.

It was claimed by the prosecution, that the prisoner was responsible, in consequence of his negligence in not using reins. EARLE, J. told the jury, that a party neglecting *ordinary caution*, and by reason of that neglect causing the death of another, is guilty of manslaughter; and that if the prisoner had reins, and by using them could have saved the child, he was guilty; but if he could not have saved it by pulling the reins, or otherwise by their assistance, they should acquit the prisoner. And he was acquitted.

The question of negligence or not, is always a question of fact for the jury, and they are the sole judges of the question, being always governed by the peculiar circumstances of each case. But it has been laid down to

the jury by a learned judge, in one case, to be the duty of a person driving through the streets, where there is an unusual concourse of people, to take more than ordinary precautions against accidents, and to use more than ordinary diligence, for the safety of the public. — *Regina v. Murray*, 5 Cox, 509, A. D. 1859.

In close analogy with injuries produced by negligent driving, are those caused by unskilful or negligent navigation of vessels; and in *Regina v. Taylor*, 9 Car. & P. 672, A. D. 1840, PARKS, B. said: "There is no doubt that those who navigate the river Thames improperly, either by too much speed, or by negligent conduct, are as much liable, if death ensues, as those who cause it on the public highway, either by furious driving or by negligent conduct."

From an examination of the authorities upon the subject of criminal negligence, we think it may be safely assumed,

First, That the negligent party is liable, whether the negligence occurred in the performance of a legal or an illegal act.

Second, That negligence of omission is criminal as well as of commission.

Third, That criminal negligence is not excused by negligence in the other party.

It is proposed to allude to each of these points in their order.

1. *The negligent party is liable, whether the act occurred in the performance of a legal or an illegal act.*

We do not mean to say, that any negligence which produces death, is punishable in the same degree, if occurring while in the performance of a legal act, as if caused while employed in violating the law, but merely, that negligence is not excusable, simply because the party charged was employed in a lawful business. And the law goes even much further. The accused may have been honestly seeking the benefit of the sufferer, and yet if, by his gross negligence, the death of the latter is occasioned, it is manslaughter.

The frequent cases of death arising from the administration of medicines to sick persons, either by regularly-educated and licensed physicians, or others, either through gross ignorance, or criminal inattention in the party administering the remedies, furnish illustrations of this principle.

The liability of physicians, and others, whose remedies to the sick unexpectedly produce their death, is not in all the cases placed upon harmonious grounds. For while all agree that if the physician, surgeon, or other person, is guilty of *gross negligence* in the administration of his medicines, and thereby causes the death of his patient, he is justly chargeable with manslaughter, yet if this fatal result is produced not from positive carelessness, but from *gross ignorance* of the powers and properties of that which is administered, this has sometimes been thought manslaughter, and sometimes only misadventure. Lord HALE says, 1 Pleas of the Crown, p. 499: "If a physician or surgeon gives a person a potion, without any intent of doing him any bodily hurt, but with an intent to cure or prevent a disease, and, contrary to the expectation of the physician, it kills him, this is no homicide,—and the like of a chirurgion." And he cites the Year Book, 3 Edw. III. Corone, 163.

Blackstone, 4 Com. c. 16, uses almost similar language: "If a physician or surgeon gives his patient a potion or plaister to cure him, which, contrary to expectation, kills him, this is neither murder, nor manslaughter, but misadventure, and he shall not be punished criminally, however liable he might formerly have been to a civil action for neglect or ignorance." And in *Rex v. Van Butchell*, 8 Car. & P. 629, Baron HULLOCKS, who was certainly a sound lawyer, and a strong man, is reported to have

ruled in 1831, relying upon Lord Hale and Blackstone, that "if a person, *bona fide*, and honestly exercising his best skill to cure a patient, performs an operation which causes death, he is not guilty of manslaughter." There was not, however, any proof of ignorance or carelessness in that case, and the prisoner was acquitted. Perhaps no case can be found where it was more directly held, that death arising from gross ignorance in the administration of medicines, was not manslaughter, than in *Commonwealth v. Samuel Thompson*, 6 Mass. 134. A. D. 1809. There the defendant, day after day, administered powerful doses of lobelia to a person who was confined to the house with a cold; the effect of which was extreme debility, convulsions, loss of reason, and finally death. The violent and powerful nature of the remedy was abundantly proved at the trial. The gradual effect of it upon the patient was from day to day communicated to the prisoner, who still continued the administration of it. Of the death of the deceased by the unskilful treatment of the prisoner, there was no reasonable doubt. The prosecutor claimed that the prisoner was guilty of manslaughter, because he rashly and presumptuously administered to the deceased a deleterious medicine, which in his hands, by reason of his *gross ignorance*, became a deadly poison. But the Court, on considering this point, were all of opinion, "*notwithstanding this ignorance*, that if the prisoner acted with an honest intention and expectation of curing the deceased by this treatment, although death, unexpected to him, was the consequence, he was not guilty of manslaughter." The Court relied chiefly upon the citation before given from Lord Hale, and upon this reasoning: "To constitute manslaughter," say they, "the killing must have been a consequence of some unlawful act. Now there is no law which prohibits any man from prescribing for a sick person with his consent, if he honestly intends to cure him by his prescription, and it is not felony, if through his ignorance of the quality of the medicine prescribed, or of the nature of the disease, or of both, the patient, contrary to his expectation, should die. The death of a man, killed by voluntarily following a medical prescription, cannot be adjudged felony in the party prescribing, unless he, however ignorant of medical science in general, had so much knowledge, or probable information of the fatal tendency of the prescription, that it may be reasonably presumed by the jury to be the effect of obstinate wilful rashness at the least, and not of an honest intention and expectation to cure."

But the English judges have held physicians, or those who assumed to be such, to a stricter accountability than this, as is apparent from many cases. In *Reg v. Spiller*, 5 Car. & P. 333, A. D. 1834, Baron BOLLAND ruled, together with Mr. Justice BOSANQUET, that any person who deals with the life or health of any subject, is *bound to use competent skill* to perform the task that he holds himself out to perform; and is bound to treat his patients with care, attention, and assiduity; and if the patient dies for want of either, the person is guilty of manslaughter. And in *Reg v. Senior*, 1 Mo. C. C. R. 346, A. D. 1832, the prisoner undertook to act as midwife; but being *grossly ignorant* of his art, and unable to deliver the woman with safety, *as might have been done by a person of ordinary skill*, broke the child's skull, and thereby occasioned its death. He was convicted of manslaughter, and *all the judges* held the conviction right.

In a somewhat similar case, in 1807, Lord ELLENBOROUGH had ruled that "to constitute manslaughter, the prisoner must have been guilty of criminal misconduct, arising either from the *grossest ignorance*, or the *most criminal inattention*. One or other of these is necessary to make him guilty of that criminal negligence and misconduct, which is essential to a case of manslaughter. *Reg v. Williamson*, 3 Car. & P. 635. Gross

Ignorance was also admitted to be sufficient to create a criminal responsibility, by Lord LYNCHURST, in *Webb's case*, 2 Lewin, C. C. 196, and 1 Moody & Rob 405, where a person was indicted for manslaughter by administering Morison's pills. The learned judge said: "That where a person of competent skill and knowledge made an accidental mistake in treatment, which occasions death, it is not manslaughter; but if, when proper medical assistance can be had, a person, totally ignorant of medicine, undertakes to administer a violent and dangerous remedy to a sick person, death in consequence is manslaughter. I shall leave it," he said, "to the jury, to say, first, whether death was occasioned or accelerated by the medicines administered; and if they think it was, then I shall tell them, secondly, that the prisoner is guilty of manslaughter, if they think that in so administering the medicine, he acted either with a criminal intention, or from very gross ignorance."

In like manner, in *Rex v. Simpson*, 4 Car. & P. 396, note, and 1 Lewin, 179, the prisoner, an old woman, who occasionally dealt in medicine, gave the deceased some corrosive sublimate, for an emetic, one dose of which caused his death. The prisoner had received the mixture from some other person. Mr. Justice BAYLEY said, he took it to be quite clear, that if a person, not of medical education, where professional aid was accessible, undertook to administer dangerous medicine, death therefrom was manslaughter, — even without evil intention; and it was immaterial whether he prepared it himself, or got it from another.

And in *Rex v. Long*, 4 Car. & P. 398, A. D. 1830, on an indictment for manslaughter, it was left to the jury, that if the death was caused by the prisoner's gross ignorance of his art, or by gross inattention to his patient's safety, he was guilty of manslaughter; and GARROW, B., said, "Why is it that we convict in cases of death by driving carriages? Because the parties are bound to have skill, care and caution." In a subsequent case against the same defendant, tried before BAYLEY, B., BOLLAND, B., and BOSANQUET, J., it was strongly urged for the prisoner, that in no case should a physician be responsible for the consequences of his medical acts, if performed with good intentions; and all the authorities bearing upon that side of the question were cited, including East, P. C. vol. i. p. 264. BAYLEY, B. said, he did not think there was any difference between a licensed and unlicensed surgeon; the manner in which the act was done, and the use of due caution, seemed to him material. But he said, all he meant to say then was, that there being conflicting authorities, and the impression of himself and the other judges being adverse to the ground taken by the prisoner's counsel, he proposed, with the assent of the other judges, to reserve the point. But he said, "If a man, either with gross ignorance or gross rashness, administer medicine, and death ensue, it will clearly be — felony."

The like principle was clearly recognized by COLERIDGE, J. in *Regina v. Spilling*, 9 Moo. & Rob. 107, where an apothecary and man-midwife had caused the death of a female by the use of a metallic instrument in her delivery. The jury were instructed, that the question for them to decide was, "whether the instrument had been used by the prisoner with due and proper skill and caution, or with gross want of skill or attention. No man was justified in making use of an instrument, in itself a dangerous one, unless he did so with a proper degree of skill and caution." The prisoner was convicted. Here we see that ignorance, or unskilfulness, was made sufficient to create a criminal responsibility. Precisely the same rule was laid down by TINDAL, C. J. in *Ferguson's case*, 1 Lewin, C. C. 181. And in a very recent case, *Regina v. Whitehead*, 3 Carr. & Kir. 202, A. D. 1848, MAULE, J. told the jury that if "a medical man, or

other person, caused the death of another, not intending to kill him, but by his gross negligence, unskilfulness, or *ignorance*, he was guilty of culpable homicide." The prisoner had performed an operation for a disease of the bone, which had resulted in death. He was convicted of manslaughter.

A passage in the *Mirror*, also, c. 4, s. 16, tends to support the position, that death, arising from gross ignorance, may be criminal. See note in *Lewin, C. C. p. 263.*

The weight of authority certainly seems to be, therefore, that if a person holds himself out as competent to prescribe for, and professionally treat a certain disease, and through his gross ignorance of the nature of the disease, or of the proper use of the remedies he employs, the death of the patient is thereby caused, he may be guilty of manslaughter, although he acted with the best intentions, and used the best of his skill and knowledge on the subject. As well expressed by Baron BAYLEY, in *Rex v. Long*, 4 Car. & P. 440, there may be such gross rashness in the application of a remedy, as will amount to manslaughter. It is not impossible, therefore, that if Samuel Thompson, before alluded to, had been tried in *Essex, Great Britain*, in place of *Essex, Massachusetts*, his fate might have been somewhat different.

If the common law, therefore, declares that gross negligence in the performance of a legal and well-intentioned act may become criminal, *a fortiori*, does it punish the same negligence if committed while in the performance of any wanton or illegal act. It has therefore been adjudged manslaughter for a person in sport to throw stones down a coalpit, whereby a man was killed. *Fenton's case*, 1 Lewin, C. C. 179. Or to administer improper quantities of spirituous liquor to a child, heedlessly, and for brutal sport. *Martin's case*, 3 Car. & P. 211. To build a fire of straw around a person intoxicated, only to frighten him, and in sport, and without any intention to do any serious injury. *Errington's case*, 2 Lewin, C. C. 217. To use unnecessary force to drive a person from one's own house, who is a trespasser there, from which death ensues. *Wild's case*, 2 Lewin, C. C. 214. So where a mother, being angry with one of her children, threw a piece of iron at it, and hit another child who happened to be present, of which blow the latter died, this was held manslaughter in the mother, although she did not intend to hit the first child, but only to frighten it. *Conner's case*, 7 Car. & P. 438. So where the deceased was in possession of the defendant's goods under legal process, and the defendant enticed him to drink freely, and when fully intoxicated, drove him about the streets in a carriage violently, of which he died, this was held to be manslaughter. *Regina v. Packard*, Car. & Marsh. 246.

Nearly akin to manslaughter by negligence in administering to the sick, are those cases of neglect to provide suitable food, clothing or shelter, on the part of parents, masters, or others, whose duty it is by law, or by their own contract, to provide such necessities. And in these cases, if death is caused by such neglect, and the party guilty of it was of ability to furnish the necessities, it is manslaughter. See *Squire's case*, 1 Russ. on Crimes, 490; *Friend's case*, Russ. & Ryan, 20; *Marriott's case*, 8 Car. & P. 425; *Edwards's case*, 1b. 611; *Self's case*, 1 East, P. C. 236; *Regina v. Plummer*, 1 Car. & Kir. 600; *Regina v. Warlten*, 1 Car. & Mar. 164.

And it is manslaughter for the master of a vessel, knowing one of his seamen to be in a state of debility, to send him aloft, in consequence of which he falls into the sea, and is drowned. *United States v. Freeman*, 4 Mason, 505.

E. H. B.

Recent American Decisions.

District Court of the United States, District of Massachusetts, March Term, 1854.

THE SCHR. SILVER SPRING.

Fishing Bounty — Forfeiture — Practice — Pleading.

The courts of the United States have no power to enforce a forfeiture by a proceeding *in rem*, unless there be a good subsisting seizure at the time when the libel is filed and allowed.

An objection to the want of a seizure prior to the allowance of the libel, is not properly a plea to the jurisdiction of the court, and is not waived by filing a claim.

A LIBEL was filed on the 1st of April, 1854, by the district attorney on behalf of the United States to enforce the forfeiture of the Silver Spring, of Harwich, a fishing schooner of 67 tons burthen, alleged to have obtained the fishing bounty for the summer of 1853, by fraud and deceit, and to have become forfeited thereby.

The proceeding was instituted on the part of the government, under the Act of Congress, passed July 29, 1813, ch. 85, sect. 5, 6 & 7.

The allegations of the libel stated that the vessel was seized on the 27th of March, 1854, before the filing of the libel, by the Collector of the District of Barnstable, on waters of admiralty and maritime jurisdiction in said district.

The evidence showed that the vessel, at the time of filing the libel, was lying at a port in the District of Barnstable; that several communications had passed between the collector of that district and the secretary of the treasury relative to proceedings against the Silver Spring; and that the collector, acting under instructions from the treasury department, had written to the district attorney requesting him to bring an information against the vessel. But that the collector had not taken possession of the vessel, or in any way notified the owners of these proceedings, prior to the arrest of the vessel by the marshal under the warrant of the court, issued on the filing of the libel.

T. K. Lothrop, for the claimants, contended, that this evidence failed to support the allegation of seizure: that the government were bound to prove a seizure by the collector, because they had alleged one: that the allegation was material, because the place of seizure determined what court should have jurisdiction to enforce the forfeiture; and also, because the statute made it essential to the power of the court to proceed to enforce a forfeiture, that there should be a valid seizure actually existing at the

time of filing the libel. Act of Congress 24th Sept. 1789, ch. 20, sec. 9; *The Brig Ann*, 9 Cranch 289.

Hallett, District Attorney for U. States, contended, first, that a seizure was not necessary, and need not therefore be alleged. Second, that if it was necessary to allege a seizure, it was a merely formal allegation, and need not be proved. *Schr. Bolina*, 1 Gallis. 75. Third, that the various communications of the United States officers (already referred to) constituted sufficient seizure. Fourth, that the parties claimant had waived their right of objection to the jurisdiction of the court by filing their claim.

The COURT, (SPRAGUE, J.) — The point taken by the counsel for the defence is, that there was no previous seizure of the vessel before the filing of the libel. And the objection is founded on the Statute 24th Sept., 1789, which defines the jurisdiction and powers of the Courts of the United States, and on the decision of the Supreme court of the United States in the case of the *Brig Ann*, 9 Cranch, 289.

The decision in that case did not depend upon the construction of the particular statute under which the property then became forfeited; but upon the construction of the Act 24th Sept. 1789, "The Judiciary Act," which act is equally applicable to the present proceeding. And therefore the rule laid down by the Supreme Court in that case, "that before judicial cognizance can attach upon a forfeiture *in rem* there must be a seizure," must govern this court in this case. The case cited by the district attorney from the first of Gallison's Reports (1 Gallis. 75) does not support the doctrine contended for, namely, that the allegation of seizure need not be proved. The objection taken in that case was, that the seizure was made by a verbal and not a written authority; and Judge Story, in his opinion, says that in England, under Stat. 29, Geo. II., ch. 35, the allegation of seizure stated in the information is held sufficient proof thereof. But he nowhere in that case says that a seizure is not necessary at common law, nor that it need not be proved in an information brought under any statute of the United States. The argument on behalf of the government, that the facts of the case show a sufficient seizure, must fail also. The evidence shows various communications between the collector of the port of Barnstable, the secretary of the treasury, and the district attorney, and the argument is, that these communications, and the filing of this libel by the district attorney, in conformity with the instructions of the collector, in connection with the fact that the vessel was at the time in the collection district of Barnstable, and that this was known to the collector, constitute a sufficient seizure. But no notice was given to the owners or parties interested in

the vessel, nor did the collector take possession of her in any way. And no cases give color to the theory that where the vessel at the time of filing the libel is within the district, there need be no seizure. The Supreme Court of the United States say that "it is a wise provision of law that requires the vessel to be seized," that "the seizure gives jurisdiction to the court." And the court before issuing a warrant to arrest the vessel will see that the libel alleges a seizure. Some actual taking is necessary to give this court jurisdiction. Here there was no previous seizure.

It is further argued that this objection comes too late; that the filing of the claim is an admission of the jurisdiction. But this is not precisely a question of jurisdiction — not a question whether this is a matter of admiralty and maritime nature; but rather a question as to the existence of those facts which will warrant the court in proceeding to enforce a forfeiture.

In requiring a seizure by the collector prior to the filing of any libel on the part of the government in order to enforce a forfeiture, the legislature has seen fit to impose a restriction upon the power of this court to punish the offence. And the plea in this case seems to me like the plea of not guilty to an indictment, to put in issue the whole question of the power of the court to proceed to judgment. And the whole question being thus put in issue by the plea, the court, if it appears that there was no seizure subsisting at the time of the filing of the libel, will not proceed to enforce a forfeiture.

A suggestion was made on the part of the district attorney that if the allegations of seizure were immaterial, he might be permitted to amend his libel by omitting their allegation. But from what has been said it appears that the information would be defective if this allegation were omitted.

Libel dismissed.

THE UNITED STATES *v.* LINDSEY NICKERSON, JR.

THE SAME *v.* HEZEKIAH TAYLOR.

Perjury — Fishing Bounty.

The seventh section of the Act of Congress of July 29th, 1818, ch. 35, (the Act providing for the payment of the Fishing Bounty) does not require any oath to the agreement referred to in that section.

The Act of July 29th, 1818, ch. 35, expressly prescribes the kind of proof of compliance with the requirements of that act, necessary to entitle the owner of a fishing vessel to claim the bounty, and it is not, therefore, competent for any officer of the United States to require new oaths, so as to make the false taking of them legally criminal.

INDICTMENTS were also found by the grand jury of the District Court for the March Term against Lindsey Nickerson, Jr., one of the owners, and Hezekiah Taylor, the late master of the above named schooner Silver Spring, charging each of them with perjury in having sworn falsely in matters to which an oath was required by the Statute of July 29, 1813, in order to obtain the bounty or allowance on the said schooner Silver Spring, for the fishing season of 1853.

The indictment against Nickerson, though it had but one count, charged him with swearing falsely in two particulars:— First. As to the national character of the fishermen on board the Silver Spring. The certificate of the owner, signed and sworn to by Nickerson, declared that three-fourths of the crew were "citizens of the United States, or persons not the subjects of any foreign prince or potentate." The indictment alleged them to be foreigners, subjects of Victoria, Queen of Great Britain, &c. Second. With swearing falsely, that the paper (a common fisherman's paper), produced to the collector at the custom-house on claiming the bounty, was the original agreement between the owners, master and men on board the said schooner, during the season of 1853, when it was not so, and when in fact the men were shipped on wages and not on their lay.

The indictment was brought under the 7th and 9th sections of the Statute of July 29th, 1813.

The first of these provides, that "The owner or owners of every fishing vessel of twenty tons or upwards, his or their agent or lawful representative shall, previous to receiving the allowance made by this act, produce to the collector who is authorized to pay the same, the original agreement or agreements which may have been made with the fishermen employed on board such vessel as is herein before required, and also a certificate to be by him or them subscribed, therein mentioning the particular days on which she sailed and returned on the several voyages, or fares she may have made in the preceding season, to the truth of which he or they shall swear or affirm before the collector aforesaid."

The ninth section provides, that "Any person who shall make any false declaration in any oath or affirmation required by this act, being duly convicted thereof, in any court of the United States, having jurisdiction of such offence, shall be deemed guilty of wilful and corrupt perjury."

The COURT, (SPRAGUE, J.) on the reading of the indictment expressed an opinion that the first charge, if sustained, could not authorize a conviction for perjury under the Stat. July 29, 1813, because that statute contained no requirement that three-fourths of the crew should be citizens of the United States.

C. B. Goodrich, and *T. K. Lothrop*, for the defendant, contended, that the seventh section did not require an oath as to the agreement; but merely an oath as to the truth of the certificate of the days of the vessel's sailing and returning. And, therefore, that the first charge in the indictment could not warrant a conviction for perjury, even supposing the defendant to have sworn falsely as to the agreement as alleged; the oath to the agreement being not required, and idle. That the word *certificate* in the seventh section was the only required antecedent of the relative pronoun *which*, and that the statute being penal must receive a strict construction.

Hallett, District Attorney for the U. States, argued, that the whole statute must be construed together, and not a single section by itself; that the whole statute should receive that construction which would best support the intention of Congress in its enactments; that the intention of Congress to require an oath as to the agreement, as well as one to the certificate, was perfectly clear; and that the rules of grammar would be perfectly satisfied by referring *which* to both the words "agreement" and "certificate."

THE COURT (SRRAGUE, J.) The precise question, here, and it is a question of importance not only in this particular case, but as regulating the proceedings in future cases arising under this statute is, whether the seventh section of the statute requires the oath of the owner to the truth of the agreement and of the certificate described in that section, or to the truth of the certificate alone. That section requires two things; first, that the owner should produce the original agreement made with the fishermen. Second, and also a certificate specifying certain particulars, to the truth of which he is required to make oath. The whole question thus turns on the force and effect of the word *which*. Does it refer to "certificate" alone, or does it embrace both "certificate" and "agreement?"

The first observation which I have to make on this point is, that the force and effect of the word "which" is entirely satisfied grammatically and philologically by the word "certificate." It may include the other; but the word certificate is a sufficient antecedent for it to answer all the rules of grammatical construction.

Is the meaning and intent of the section satisfied by this construction? It is suggested by the district attorney, that if you strike out the words specifying the contents of the certificate, which are, as it were, parenthetical, and may be omitted without injury to the sense, so that the clause will read, "shall produce the original agreement, and also a certificate to be subscribed by him to the truth of which he shall swear," &c., the construction

will then be clear, and the intention of the legislature to require an oath, as well to the truth of the agreement as to that of the certificate, certain and manifest.

Is this so? Is the language of the section appropriate for this construction, if you strike out the intermediate clause? I think not. Persons do not swear to the truth of an agreement, but to its genuineness, or that it is the original agreement. And here the printed oath to which the owner is required to swear is divided to suit this difference. And he swears that the certificate is true, and that the paper produced is the original agreement. Is this oath, that the paper produced is the original agreement made with the men, the same as an oath to the truth of the agreement? It may be so, but perhaps it is not. For part of the case here may be that there was another verbal agreement originally, and that this written one was made subsequently.

We all know the minute description of the oath required in an indictment for perjury. Can we say, therefore, that when the oath is that the agreement produced is the original one, that an indictment setting forth this oath, and charging the defendant with perjury in having taken it falsely, will satisfy a statute requiring an oath as to the truth of the agreement, and providing that this oath, if taken falsely, shall subject the person so taking it the pains and penalties of perjury. I only adduce this to show that in requiring an oath to the agreement it has been found necessary to alter the phraseology of the statute.

But further, there is nothing in the seventh section of the Statute July 29th, 1813, which requires that the two acts therein made requisite for obtaining the fishing bounty should be done at the same instant. They may be done at different times. The certificate may be made at one time and the agreement produced at another, a week, a month, or six weeks later, it is immaterial.

The word "also" has besides to a legal ear a peculiar force and significance. It indicates that you are going to a distinct and independent matter, and if this statute was drawn by any one familiar with legal language, there was probably a purpose in its insertion. At all events the language is at least so doubtful that no court of justice would allow a person to be convicted of so grave an offence upon language so vague, ambiguous, and indeterminate. Congress may have intended to require an oath as to the agreement, or they may have not. It is so uncertain that I cannot say.

It is argued on the part of the government that two things are necessary to qualify a vessel to obtain the fishing allowance; first, that the vessel should have been four months at sea; second, that a certain specified written agreement should have

been made with the fishermen employed; that an oath of the owner is required to prove a compliance with the laws in the first particular, and that there is equal reason for requiring it as to the agreement. But the question is not what Congress might have done, but what they have done. And I see a ground of distinction that may have induced Congress to require an oath as to the certificate, when they did not as to the agreement. It is provided by another section of the same statute that fraud in producing the agreement, or in any proceeding necessary to obtain the bounty, shall cause a forfeiture of the vessel. This is a heavy penalty, and Congress may have been satisfied that this was a sufficient punishment for fraud relating to the agreement. The owner is to produce to the collector who is to pay the bounty a certificate of the days on which the vessel sailed and returned. This is the only document required by the statute. The circular of the secretary of the treasury obliges the owner of a vessel claiming the bounty, to produce the log book kept on board the vessel during her fishing voyage. But the only thing the statute requires is the certificate. The time the vessel has been in port during the season is necessarily excluded in the computation of the time she has been engaged in fishing, and in the absence of a log book — and the statute, as already stated, makes no provision for the existence of such a book — there is great difficulty in proving this, and so the oath of the owner was required by the statute to the certificate of the days of the vessel's sailing and returning, as proof that she was the proper time at sea.

Courts of justices are not inclined to increase or extend custom-house oaths. In the present case the legislature probably did not intend to require an oath as to the agreement.

Upon learning this opinion of the court, the district attorney proposed to prove that the oath as to the agreement was taken in pursuance of instructions of the secretary of the treasury to the collectors, relative to the payment of the fishing bounty, and contended (upon the third section of the Statute March 1st, 1828, ch. 37, and the case of *U. S. v. Bailey*, 9 PETERS, S. C. R.,) that the secretary of the treasury had a right to require an oath as to the agreement, and that such an oath so required would be a legal one, the false taking of which would sustain an indictment for perjury.

The COURT, (SPRAGUE, J.) without expressing an opinion on this point, held the evidence inadmissible, in support of the present indictment, which rested upon different grounds, and charged the defendant with perjury, committed by falsely swearing in an oath required by the Statute July 29th, 1813, and thereupon ordered the jury to return a verdict of NOT GUILTY.

In the case of *Taylor*, the master of the vessel who was charged with a similar offence under the same statute, the jury, under the direction of the court, returned a verdict of NOT GUILTY.

A motion was thereupon made for his discharge.

Hallett, District Attorney for the United States, objected on the ground that further proceedings would be instituted against him under the statutes of March 1st, 1823, ch. 37, sec. 8, which provides that "any person who shall swear falsely touching the expenditure of public money, or in support of any claims against the United States, shall, on conviction therefor, suffer as for wilful and corrupt perjury;" and he cited the case of *U. S. v. Bailey*, 9 PETERS, S. C. R., already referred to, to show that such an indictment might be maintained.

The COURT, (SPRAGUE, J.) It is proper for the court on a motion for the discharge of a defendant to see whether he may be liable on any new charge, and whether he should therefor be detained in custody to answer further proceedings. The defendant in this case is charged with swearing falsely that the agreement produced by him to the collector is the original agreement made with the fishermen on board the schooner *Silver Spring*, during the last season. The indictment was brought under the Statute July 29, 1813, and the court have already decided that no oath to the agreement is required by that act, and the jury under the direction of the court have returned a verdict of not guilty. A motion has been made for the discharge of the defendant, to which the district attorney objects on the ground that he wishes to retain him in custody, that he may institute new proceedings against him for the same offence. He states that the oath as to the agreement was taken in compliance with the instructions of the secretary of the treasury, and in conformity with the usage for the last forty years in all cases where claims have been made for the fishing bounty, and he cites the decision of the Supreme Court of the United States in *United States v. Bailey*, 9 PETERS, to show that the secretary of the treasury has power to require oaths to be taken in support of claims, and that they are legal oaths.

The case in the ninth of Peters' Reports, though the decision of the Supreme Court, and therefore binding on this court, is undoubtedly the very extreme of the law, and is not to be extended. Let us compare it with the present case, and see if there is any distinction between them. In that case an act of Congress authorized the treasury department to adjudicate upon and settle certain claims on the State of Virginia, for pay for military service, which had been assumed by the United States. There was no provision as to the kind of proof the secretary might

require, and the adjudication of the department was, I think, final. The Supreme Court say that Congress must be supposed to have acted with reference to the well-known usage of the department to require the oath of the claimant in support of claims payable there. And therefore that the secretary had authority to insist upon the oath in that case, and that the oath so taken was a legal one.

But by the Statute of July 29, 1813, Congress has seen fit to prescribe expressly the kind of proof of compliance with the requirements of that act, for obtaining the fishing bounty, which shall be necessary to entitle the owner of a fishing vessel to claim the bounty. It has directed that the owners of vessels of more than twenty tons, shall produce the agreements made with their fishermen, and also a certificate of the days of the vessel's sailing and returning, and of the time that she was at sea. And it has further required the oath of the owner to the truth of the certificate. There are other requisitions for boats and vessels between five and twenty tons, and when these proofs have been made, the collector is to pay the bounty. Now when Congress, the supreme legislative authority, has thus directed precisely what shall be done to entitle a party to receive the bounty — what papers shall be produced, and to which of them an oath shall be required, it is not competent for any officer to require new oaths, so as to make the false taking of such oaths legally criminal. The difference between this case and that in the ninth of Peters, is, that in that case no mode of proof was provided by law; in this, Congress has seen fit to prescribe the amount and manner of proof.

I might further say that in this case the secretary of the treasury has no authority by the statute. And that the power of deciding on the claims is left entirely to the collector. As to the power of the secretary or of the collector to regulate the proof necessary in relation to matters required by other statutes, in which no mode of proof is provided, I have no occasion to express any opinion.

The only oath which it is alleged that the defendant Taylor took falsely is the oath as to the agreement. And as the production of the agreement is one of the requirements of the Statute of July 29th, 1813, while no oath regarding it is required by that act, the oath alleged to have been taken could not have been a legal one, and could not therefore be the ground of an indictment for perjury. For these reasons the defendant must be discharged.

*This is not correct. The
Judge declined giving an opinion
B. F. Whitt*

In Court of Appeals of the State of New York, July, 1854.

Present — GARDINER, Chief Judge ; and DENIO, JOHNSON, RUGGLES,
EDWARDS, PARKER, W. F. ALLEN, and SELDEN, Judges.

ANDREWS et al. v. DURAND et al.

It is a general rule, that if a person contract with another for a chattel, which is not in existence at the time of the contract, and the other proceeds to execute the order, the buyer acquires no title to the chattel, till it is finished and delivered to him.

And this rule is applicable to an agreement made with the builder of a barge, though the work is to be performed under the direction of a superintendent employed by the purchaser, and is to be paid for in instalments at specific stages of the work. The English cases reviewed, and *Clarke v. Spence*, 4 Adolph. & Ellis, 448 ; and *Woods v. Russel*, 5 Barn. & Ald. 942, so far as they hold a contrary doctrine, disapproved.

THIS was an action brought to recover an unfinished barge, alleged to have been converted by the defendants on the 10th of September, 1849. The plaintiffs claimed title to the property by virtue of an assignment made by Bridges & Bishop, on the 4th August, 1849, in trust for creditors. The question in the case was, whether it belonged, at the time of the assignment, to Bridges & Bishop, or to the defendants.

Bridges & Bishop were ship-builders, and undertook to build the barge for the defendants, under a written agreement, made on 24th April, 1849. The agreement provided that Bridges & Bishop should find all the materials, and build the barge, subject to the approval of a superintendent, who should have the privilege of rejecting any timber he might think not suitable ; the barge to be complete, and delivered to the defendants on the 1st of August, 1849. The builders were to forfeit \$250 for each week's delay, if they failed to fulfil by the time specified, or within ten days thereafter. The defendants were to pay \$5000 for the building of the barge, viz., one thousand dollars when the keel was laid ; one thousand dollars when the frame was up ; one thousand dollars when planked and caulked ; and two thousand dollars when completed and delivered.

The defendants made three payments of \$1000 each ; and after the third payment, and before the barge was finished, the sheriff levied upon it by virtue of several execu-

tions against Bridges & Bishop. They assigned to the plaintiffs after the levy, and the plaintiffs paid the sheriff the amount of the executions, and demanded the barge from the defendants, who refused to deliver her up.

The cause was tried at the Winter Circuit before Justice WATSON, in April, 1850, when a nonsuit was directed, the Judge holding that the defendants were the owners of the barge at the time of the assignment.

On appeal to the Supreme Court, the judgment rendered at the Circuit was affirmed, and the plaintiffs appealed to this court.

N. Hill, Jr., for appellant.

S. N. Hammond, for respondent.

The following opinion was delivered by

PARKER, J. — The question we are called upon to decide in this case is, whether, under the rules of law applicable to the contract, the barge, at the time of the assignment to the plaintiffs belonged to Bridges & Bishop, who constructed it, or to the defendants, who employed them to build it.

The general rule is, that if a person contract with another for a chattel which is not in existence at the time of the contract, though he pay him the whole value in advance, and the other proceeds to execute the order, the buyer acquires no property in the chattel till it is finished and delivered to him. The case of *Muchlon*, assignee of *Royland v. Mangles*, decided in England in 1808, 1 Taunt. R. 318, recognized to the fullest extent, the general rule I have stated. It was an action of trover by the assignees of a bankrupt, for a barge and other effects. Royland, who was a barge-builder, had undertaken to build the barge in question for Pocock. Before the work was begun, Pocock advanced to Royland some money on account, and as it proceeded he paid him more, to the amount of £190 in all, being the full value of the barge. When it was nearly finished, Pocock's name was painted on the stern. Two days after the completion of the work, and before a commission of bankruptcy had issued, the defendant, who was an officer of the sheriff, took the barge under an execution against Royland, the barge at the time of the levy not having been delivered to Pocock. It was *held*, that the title of the barge had never passed from Royland to Pocock, and judgment was given for the plaintiff. The correctness of this decision has never been questioned either in England or in this country, but has been repeatedly followed in both.

In this State the more prominent cases are *Merritt v. Johnson*, 7 Johns. 473; *Gregory v. Stryker*, 2 Denio, 628; *Johnson v. Hunt*, 11 Wend. 139.

But it is sought to take this case out of the general rule, because the work was to be performed under the direction of a superintendent employed by the defendants, and was to be paid for at specific stages of the work. The first of the English cases relied on to sustain that position, is that of *Woods*, assignee of *Paton v. Russel*, 5 Barn. & Ald. 942; which was decided in 1822. Paton, a ship-builder, had contracted with Russel to build a ship for him, and complete it in April, 1819; Russel to pay in four instalments. The first and second instalments were duly paid. In March, 1819, Russel appointed a Master, who superintended the building. On Paton's signing the usual certificate of her build, the ship was registered in Russel's name, and on that day he paid Paton the third instalment. It was held, that the general property was vested in Russel from the time the registry was completed, but that the plaintiff had a lien for the work done after the payment of the third instalment. There seems to me to be enough in that case to sustain the judgment independent of the circumstances relied upon by the defendants in this action. The registry of the vessel in the name of Russel on the certificate and by the aid and procurement of Paton, was equivalent to a delivery, and was conclusive to show that the parties to the contract agreed, that from that time the property belonged to Russel. In delivering the opinion of the court, ABBOTT, Ch. J., said: "It is part of the terms of the contract, that given portions of the price should be paid according to the progress of the work; part when the keel is laid, and part when they are at the light planks. The payment of these instalments appears to us to appropriate specifically to the defendant the very ship so in progress, and to vest in the defendant a property in that ship, and that as between him and the builder he is entitled to insist upon the completion of that very ship, and that the builder is not entitled to require him to accept any other. But this case does not depend merely upon the payment of the instalments; so that we are not called upon to decide how far that payment vests the property in the defendant, because here, Paton issued the certificate to enable the defendant to have the ship registered in his (the defendant's) name, and by that act consented, as it seems to us, that the

general property in the ship should be considered from that time as being in the defendant."

The decision in *Woods v. Russel* seems very improperly to have been considered as resting on the ground first stated in the extract I have made, *Atkinson v. Bell*, 8 Barn. & Cress. 277, 15 Eng. Com. Law, 218, and so far it has evidently been looked upon with distrust and followed with reluctance in the later decisions of the English courts.

In *Clarke et al. v. Spence et al.*, 5 Adol. & Ellis, 448, 31 Eng. Com. L. 112, the plaintiff contracted with a ship-builder to build him a ship for a certain sum, to be paid in instalments as the work proceeded. An agent of the plaintiff was to superintend the building. The builder became bankrupt before the ship was completed. Afterwards the assignees completed the ship, and all the instalments were paid, or tendered. In trover by the plaintiff against the assignees for the ship, it was held that on the first instalment being paid, the property in the portion then finished became vested in the plaintiff, subject to the right of the builder to retain such portion for the purpose of completing the work and earning the rest of the price, and that each material, subsequently added, became, as it was added, the property of the general owner. This decision was made, as was said, by WILLIAMS, J., who delivered the judgment of the court, "with some hesitation," and entirely upon the authority of the expression in the opinion of the court, in *Woods v. Russel*, first above quoted. WILLIAMS, J. conceded, that the facts in the case of *Woods v. Russel* did not make it necessary to determine the point whether the building of the vessel under the superintendence of a person appointed by the purchaser, and the payment of instalments at particular stages of the work, vested the general property in the purchaser, and added, "Neither did the decision of the court proceed ultimately on any such point, but on the ground that the vessel, by virtue of the certificate of the builder, had been registered in the name of the purchaser, and that the builder had by his own act declared the general property to be in the purchaser." And he proceeded in a very full and able opinion, to show that the opinion thus extra-judicially expressed in *Woods v. Russel* was in conflict with well-established rules of law. WILLIAMS, J. said: "Until the last of the necessary materials be added, the vessel is not complete; the thing con-

tracted for is not in existence ; for the contract is for a complete vessel, and not for parts of a vessel ; and we have not been able to find any authority for saying, that whilst the thing contracted for is not in existence as a whole, and is incomplete, the general property in such parts of it as are from time to time constructed, shall vest in the purchaser, except the above passage in the case of *Woods v. Russel*." And he followed the authority of *Woods v. Russel*, on the ground that it had been subsequently recognized, and that such construction had probably been acted upon since the decision by persons engaged in ship-building.

The cases of *Woods v. Russel* and *Clarke v. Spence*, were recognized in *Laidler v. Burlison*, 2 Mees. & Wels. 602, though they were not followed, being inapplicable to the case then before the court.

It cannot be denied but the decision in *Clarke v. Spence* covers the whole ground assumed by the defendant's counsel in this case ; but it has never yet been followed in this country. In *Moody v. Bram*, 34 Maine R. 107, allusion is made to such an exception to the general rule, but it was unnecessarily said, inasmuch as it was adjudged that the case did not come within such an exception. • It has also been stated in the elementary books as resting on the English decisions I have cited. 1 Story on Sales, §§ 315, 316 ; Chitty on Contr. 378 ; Long on Sales, 288 ; Story on Contracts, § 813. I find no adjudged case in which the exception claimed has been applied in this country, and the case of *Clarke v. Spence* not being authority of itself, ought not to be followed here, if it is in conflict with well-settled principles of law, or inconsistent with decisions made in our own State. We are not placed in a situation to feel any of the embarrassments from a supposed precedent, under which the court felt compelled, in the case of *Clarke v. Spence*, to make a decision inconsistent with their own reasoning, and against their own good judgment. A well-established general rule, if founded upon principle, should not be invaded by an exception, without good reason.

The question is, simply, What was the contract of the parties ? 2 Mees. & Wels. 602. If it was intended that certain parts of the vessel should pass to the defendants as the work progressed and was paid for, it was very easy for the parties to have so provided in the contract in express

terms. As they did not do this, we must gather the intent from the contract as expressed. It is not a contract to purchase parts of a barge, but an entire vessel. And the general rule, that the title does not pass till completion and delivery, must control the construction, unless a different contract is to be implied from the fact that the barge was built under the superintendence of a person employed and paid by the defendants, and was paid for by instalments at certain stages of the work.

It cannot be claimed, that the employment of a superintendent, who decided upon the quality of the materials, and approved the work, amounted to a delivery of the parts as the work progressed; but it is supposed, that inasmuch as it bound the builders to deliver that particular barge, and took away from them the right to substitute another in its place, it amounted, together with the payments, to a transfer of the general property to the purchaser. The mere payment by instalments at specific stages, does not of itself, imply anything further towards a change of title to property, than the payment of instalments at fixed periods of time. Now, conceding that the effect of both circumstances combined, is to place the builder in a situation in which he would be bound to finish and deliver the specific vessel begun, it by no means follows that they vest the title to the vessel in the purchaser, before its completion. It becomes, in such case, simply a contract for the finishing and delivery of that particular vessel; and the obligations upon the parties are the same as if the builder had contracted to finish and deliver a particular vessel partly constructed at the time of the contract.

Merritt v. Johnson, 7 Johns. 473, was a case in which it was adjudged that the property to the vessel remained in the builder until completion and delivery, though some of the materials employed had been furnished by the purchaser.

The question of ownership by no means depends upon the right that a particular article in preference to another shall be finished for the purchaser. In *Merritt v. Johnson*, 7 Johns. 473, Travis agreed to build a sloop for E. Merritt, and to furnish the timber for the frame, and E. Merritt was to pay in instalments, and furnish materials for the joiners' work. E. Merritt furnished various materials, and advanced money to Travis, with which to pur-

chase other materials, and afterwards assigned the contract to D. Merritt, who continued to furnish materials and advance money to Travis on the contract, until about one third the vessel was finished, when, Travis having furnished the materials he was bound to supply under the contract, it was levied on under an execution against Travis, and sold by the sheriff to C., who afterwards completed the vessel and sold her to Johnson. An action of trover being brought by D. Merritt against Johnson, it was *held* that the property in the vessel was in Johnson, and that D. Merritt could not have any property in the vessel under the contract, until she was completed and delivered to him. This was, therefore, a case where the ownership remained in the builder, though he would have no right to have substituted another vessel in its place, parts of the materials having been furnished by the purchaser. It appeared in *Merritt v. Johnson*, that the sloop was built upon ground hired by Travis, and in this suit the barge remained at the yard of the builders. It is said, however, in *Johnson v. Hunt*, 11 Wend. 139, that had the fact been different in *Merritt v. Johnson*, it would not have changed the result. See also Blackburn on Sales, 158; 2 Denio, 628; 21 Pick. 205.

I think the legal title to the barge remained in the builders at the time of their assignment to the plaintiffs, and the judgment of the Supreme Court should be reversed, and a new trial ordered. DENIO, J. also read an opinion in favor of reversal. All the judges concurring, judgment was entered accordingly.

*Supreme Judicial Court of Massachusetts, Middlesex ss.,
October Term, 1853.*

LUCY J. WALKER *v.* ANDREW FURBUSH.

Landlord and Tenant — Action for use and occupation.

A tenant at will, paying rent quarterly, who quits at the end of a quarter, without giving previous legal notice, is *primâ facie* liable in an action of contract for use and occupation, for the amount of another quarter's rent. And when the landlord in such case, went into the house and shut the door which had been left open when the tenant quitted, it was *held* that this was not a taking of possession which deprived him of the right to recover in such action, and that it had no legal tendency

to show a waiver by him of the required notice of the tenant's intention to quit.

THIS was an action of contract to recover \$43.75, for the use and occupation of a house, from October 1st, 1851, to January 1st, 1852. At the trial in the Court of Common Pleas, before WELLS, C. J., it appeared in evidence that the defendant had occupied a house in Charlestown, belonging to the plaintiff, for several years, as tenant at will, until October 1st, 1851, paying rent quarterly, on the first days of January, April, July, and October. That on the 30th of September, 1851, the defendant left the house, without giving the plaintiff any notice of his intention of so doing; and that the plaintiff, on the 8th day of October, 1851, went into the house to shut a door that had been left open.

The defendant moved the court to instruct the jury, that upon this evidence the plaintiff could not recover in this form of action. But the court instructed the jury otherwise, and a verdict was returned for the plaintiff. The defendant alleged exceptions to the instructions.

M. G. Cobb, for the defendant, cited 2 Dane Ab. 444; 4 Met. 227; 7 Dowl. & Ryl. 117; 4 Comstock, 217; 1 Denio, 41; 2 Denio, 84; 7 Barbour, 191; 30 Maine, 331.

H. C. Hutchins, for the plaintiff, cited 2 Whart. 42; 2 Campb. 103; 6 Bing. 206; 5 Taunt. 519; 5 Bing. N. R. 650; 4 Taunt. 44; 1 Dowl. & Ryl. 205; 25 Wend. 669.

The opinion of the court was delivered by

METCALF, J. As the defendant was tenant at the will of the plaintiff, and the rent reserved was payable quarterly, it was necessary for him, if he would determine the estate at will by notice, to give the plaintiff three months' notice in writing, Rev. Stat. c. 60, § 26. But he quitted the demised premises, at the end of a quarter, without giving the plaintiff any previous notice; and she has brought an action for use and occupation of those premises for the next quarter after they were so quitted. The single question before us is, whether such action can be maintained in such case. And we are of opinion that it can be.

By the English common law this action would not lie. But by an act of parliament, St. 11 Geo. 2, c. 19, § 14, it was made "lawful to and for the landlord or landlords, where the agreement is not by deed, to recover a reasonable satisfaction for the lands, tenements or hereditaments, held or occupied by the defendant or defendants, in an

action on the case, for the use and occupation of what was so held or enjoyed." And Mr. Dane says, that though it is not understood that this statute has been adopted in Massachusetts, yet that "we have practised on the principles of it, from the first settlement of the country." 2 Dane Ab. 442. Tindal, C. J. says, that from the terms of this statute, "it seems to follow, that if there is an actual *holding*, and the power to occupy or enjoy is given by the landlord to the tenant, so far as depends on the landlord, the action is maintainable." 7 Scott, 547, and 5 Bing. N. R. 507; 2 Man. Grang. & Scott, 657; 6 Bing. 211. And it is well settled, in England, that if the tenant takes possession under the demise, actual occupation by him till the tenancy is regularly determined is not necessary, in order to render him liable to the action for use and occupation. In that action, the landlord does not recover the rent, but an equivalent for rent, namely, "a reasonable satisfaction for the lands, &c. held or enjoyed" under the demise. If the defendant actually *holds*, though he does not actually occupy or enjoy, the action may be maintained against him. 2 Moore & Payne, 504, and 6 Bing. 211; 7 Scott, 547, and 5 Bing. N. R. 507; 2 Man. Grang. & Scott, 657. Therefore the landlord may recover for the use and occupation after the tenant quits, if he quits without giving the notice required by law to terminate the tenancy. In such case, he *holds* the demised premises, within the meaning of the statute. *Redpath v. Roberts*, 3 Esp. 225; *Harland v. Bromley*, 1 Stark. 455; 2 Selw. N. P., 11th ed., 1399, 1402; Taylor, Land. & Ten. § 647. In *Whitney v. Gordon*, 1 Cush. 266, it was distinctly announced by this court, that a tenant who, like the present defendant, quitted at the end of a quarter without giving legal notice, was *prima facie* liable, in an action for use and occupation, for the amount of another quarter's rent. See also *Ward v. Mason*, 9 Price, 291. There is nothing in the case now before us, to rebut the *prima facie* liability of the defendant in this action. The plaintiff's going into the house, and shutting the door that had been left open when the defendant quitted, was not a taking of possession which deprived her of a right to recover in this action; nor had it any legal tendency to show a waiver by her of the required notice of the defendant's intention to quit. See *Griffiths v. Hodges*, 1 Car. & P. 419; 3 Esp. and 1 Stark. *ubi sup.*

The cases cited by the defendant's counsel from the New York Reports, to show that, in an action for use and occupation, a recovery cannot be had beyond the period of actual occupation, were decided upon the terms of the Revised Statutes of that State, which are more restricted than those of the English Stat. of 11 Geo. 2, c. 19.

Exceptions overruled.

*Supreme Judicial Court of Massachusetts, Middlesex, ss.
October Term, 1853.*

JAMES W. SIMPSON, petitioner, v. WILLARD DALEYMPLE *et al.*

Mechanics' Lien — Petition to enforce.

A petition to enforce a mechanic's lien for labor, under Stat. 1851, ch. 343, must contain a brief statement of the contract on which it is founded; and when a petition alleged that "by the request of B., of said C., and at his instance, and under his direction and supervision, and by virtue of a contract with him, the said petitioner actually performed labor in erecting three brick houses, each two stories and one-half high, situated on the corner of B. H. and L. streets, in said C.; that said houses are situated on a lot of land extending eighty-four feet on B. H. street as aforesaid, and seventy-five feet, more or less, on L. street as aforesaid; that said labor was by your petitioner performed by virtue of his said contract and agreement with said B., said B. being the contractor for building said houses, and the supposed owner thereof;" that the petitioner labored on said houses 121 days, and his labor was reasonably worth \$2 per day; — it was *held*, that this was not such a statement; also, that the petition was further defective in stating that the contract was made with B. as the contractor for building the houses and the supposed owner thereof, and that the contract should be alleged to have been made with the owner, or with the person contracting with the owner — and a demurrer to the petition was sustained on these grounds. But, it being also objected, that the description of the premises as set forth in the petition was uncertain and indefinite, and wholly insufficient, and that the petition did not set forth that the proper preliminary certificate had been filed in the registry, it was *held*, that these reasons were insufficient to sustain the demurrer.

THIS was a petition to enforce a lien for labor upon certain houses, under Stat. 1851, chap. 343. The petition set forth "That by the request and at the instance of William Bragdon, of said Charlestown, and under his direction and supervision, and by virtue of a contract with him, the said petitioner actually performed labor in erecting three brick dwelling houses, each two stories and one-half high, situated on the corner of Bunker Hill and Linden streets, in said Charlestown; that said houses are situated on a lot of land extending eighty-four feet on Bunker Hill street as aforesaid; and seventy-five feet, more or less, on Linden street as aforesaid; that said labor was by your petitioner

performed, by virtue of his said contract and agreement with said Bragdon ; said Bragdon being the contractor for building said houses, and the supposed owner thereof ; that said labor so performed was reasonably worth two dollars per day, and that your petitioner ought to receive that rate of compensation therefor ; that said labor was performed by your petitioner as a carpenter in erecting said houses, and that he actually and personally labored thereon in that capacity one hundred and twenty-one days, between [the] twenty-sixth day of August, A. D. 1851, and the thirteenth day of January, A. D. 1852. That your petitioner has been paid the sum of one hundred and twenty-five dollars, and no more, for the labor so performed ; that there now remains justly due to your petitioner a demand of one hundred and seventeen dollars, after all just credit given, which is to be a lien upon said property. And your petitioner further avers that within sixty days after said labor was by him performed, he filed in the office of the Registry of Deeds for said Middlesex county, where the land lies, a certificate containing a just and true account of the demand justly due to your petitioner, after all just credits given, pursuant to the statute in such case made and provided," &c., &c. The respondents demurred to the petition, and assigned sundry causes of demurrer, which appear in the arguments of counsel. The Court of Common Pleas sustained the demurrer, and the petitioner appealed.

Ezra Ripley, for the respondents.

The first cause of demurrer assigned is, that the petition does not set forth a sufficient statement of the contract ; for,

First : The statute requires that the petition contain a brief statement of the contract, on which it is founded. Stat. 1851, chap. 343, sec. 4 ; Rev. Stat. chap. 117, sec. 6. But the contract should also be set forth distinctly and accurately ; the very foundation of the action being the contract. *Kirby v. Tead*, 13 Met. 149 ; Stat. 1851, chap. 343 ; Rev. Stat. chap. 117.

The second cause of demurrer is, that the description of the premises, as set forth in the petition, is uncertain, indefinite, and wholly insufficient ; for,

First : The statute requires that the petition contain a description of the premises ; but the description should be accurate enough to found judgment and a warrant upon. *Doe v. Plowman*, 1 East, 441 ; *Miller v. Miller*, 16 Pick. 215. Or,

Second : It must at least be such a description as would be sufficient in a deed to convey the premises. *State v. Certain Spirituous and Intoxicating Liquors*, 15 Law Reporter, 193 ; *Atwood v. Atwood*, 22 Pick. 283. But,

Third : In a deed the description must be sufficient to ascertain the estate to be conveyed. *Worthington v. Hyler*, 4 Mass. 196 ; *Jackson v. Moore*, 6 Cowen, 706 ; *Atwood v. Atwood*, 22 Pick. 283 ; *Crafts v. Hibbard*, 4 Met. 438.

The third cause of demurrer is, that Bragdon, with whom the petitioner is alleged to have contracted, is neither alleged to be the owner, nor the contractor with the owner ; for,

First. The petitioner's contract should be alleged to have been made either with the owner, or with the person contracting with such owner. Stat. 1851, chap. 343 ; *Thaxter v. Williams*, 14 Pick. 49.

The fourth cause of demurrer is, that the petition does not set forth that the proper preliminary certificate had been filed in the Registry of Deeds ; for,

This form of action depends wholly upon statute, and therefore all the facts necessary to bring the present case within the statute must be alleged. *Drown v. Stimpson*, 2 Mass. 441 ; *Williams v. Hingham Turnpike*, 4 Pick. 341 ; *Soper v. Harvard College*, 1 Ib. 177 ; *Bath v. Freeport*, 5 Mass. 325 ; *Hall v. Bumstead*, 20 Pick. 2.

J. Q. A. Griffin, for the petitioner.

The petition should contain these elements : — A brief statement of the contract ; the amount due thereon ; a brief description of the premises ; a brief statement of all other material matters. Rev. Stat. ch. 117, sec. 6 ; Stat. 1851, ch. 343, sec. 4.

First. As to the contract. — A perfect contract is the result of the three facts stated, viz. : That Bragdon set him at work ; that he actually worked under his supervision and direction ; that his services were worth what is charged. *Shaw v. Barnes*, 5 Barr, 19 ; *Bank of Charlestown v. Cortin*, 18 Conn. 347.

Second. As to the description. — The premises are identified with precision by these four circumstances, viz. : Three brick dwelling houses ; each two stories and one-half high ; situated on the corner of Bunker Hill and Linden streets ; the distances being given upon each street. *Springer v. Keyser*, 6 Wheaton, 187 ; *Shaw v. Barnes*, 5

Barr, 19; *Driesbach v. Keller*, 2 Rawle, 77; *Forbush v. Lombard*, 13 Met. 109; *Sawyer v. Ryan*, Ib. 144; 12 Serg. & Rawle, 301.

Third. As to ownership. — The allegation is unnecessary. Rev. Stat. ch. 117, sec. 6. It is stated to a reasonable certainty that he is the owner, and positively that he is the contractor. The petition is not fatally defective, even if that part is omitted, provided the original certificate contained it. Stat. 1851, ch. 343, sec. 3; *Springer v. Keyser*, 6 Wheaton, 187; *Christian v. Manderson*, 2 Rawle, 363.

Fourth. As to the certificate. — The proper certificate would be one in conformity with the statute requiring it; and that, it appears, was duly filed. Stat. 1851, ch. 343, sec. 3. To have repeated the whole certificate would have been not a brief, but a detailed statement thereof. Rev. Stat. ch. 117, sec. 6.

The opinion of the court was delivered by

METCALF, J. — The court are of opinion that this petition is defective, and that the demurrer to it must be sustained. The Revised Statutes, chap. 117, sec. 6, require that a petition to enforce the lien given to the person who shall, by contract with the owner of any piece of land, furnish labor or materials for erecting or repairing any building, or the appurtenances of any building on such land, "shall contain a brief statement of the contract on which it is founded, and of the amount due thereon, with a description of the premises which are subject to the lien, and all other material facts and circumstances." And the statute of 1851, chap. 343, which gives a lien to any person who shall actually perform labor in erecting or repairing any building, by virtue of any contract with the owner thereof, or other person who has contracted with such owner for erecting, altering, or repairing such building, provides by sec. 4, that such liens may be enforced by petition, in the manner provided by the fifth and subsequent sections of the Revised Statutes, chap. 117. The petition, under this last statute, must therefore, like a petition under the Revised Statutes, contain a brief statement of the contract on which it is founded. But the present petition merely states that the petitioner, by the request of B., and at his instance, and under his direction and supervision, and by virtue of a contract with him, actually performed labor in erecting three brick dwelling houses in Charlestown; and

that said labor was performed by virtue of said contract and agreement with B., who was the contractor for building said houses, and the supposed owner thereof; that the petitioner labored on said houses one hundred and twenty-one days, and that his labor was reasonably worth two dollars per day. But this is not a statement of the contract with B. It is merely a statement that there was a contract of some kind, express or implied, under which the petitioner labored for a certain number of days. The petition ought to have shown what that contract was. Again, the petition is wrong in stating that the contract, whatever it was, was made with B. as the contractor for building the houses, and the supposed owner thereof. Under Stat. 1851, ch. 343, the words "owner" and "contractor" denote two persons. The contractor is he who makes sub-contracts with workmen.

The petition is bad for the first and third reasons assigned for the demurrer. The other reasons assigned seemed to us insufficient to sustain it.

Petition adjudged bad.

*Supreme Judicial Court of Massachusetts, Suffolk, ss.
March Term, 1853.*

JOHN RAND *et al.* v. O. H. MATHER.

Statute of Frauds — Contract. — Loomis v. Newhall, 15 Pick. 159, overruled.

An agreement may be void in part by the statute of frauds, and not void *in toto*. If any part of an agreement is valid it will avail *pro tanto* — though another part may be prohibited by statute — provided the statute does not either expressly or by necessary implication, render the whole void. And provided, furthermore, that the sound part can be separated from the unsound, and be enforced without injustice to the defendant.

THIS case came on for trial in the Court of Common Pleas, in October, 1851. It was an action for work and labor on three houses belonging to the defendant. The plaintiff began his work under a contract with one Whiston, who was building the houses for the defendant. Whiston failed, and the plaintiff refused to go on with his work. The defendant then told the plaintiff to proceed with his work, and he would pay him for what he had done as well as for what he should do. The plaintiff then went forward and finished his work.

A. S. Wheeler, for the defendant, objected that, as a part of this contract was clearly within the statute of frauds, the whole must fail, according to the rule of *Loomis v. Newhall*, 15 Pick. 159.

HOAR, J. considered himself bound by the authority of *Loomis v. Newhall*, whatever objection might be made to it on principle, and refused the plaintiff leave to waive so much of his claim as related to the prior work, and ruled that under no state of the evidence could the plaintiff recover for the subsequent work, as the prior work was within the statute of frauds, and the contract was entire. Exceptions were allowed.

The exceptions were argued at the March term of the Supreme Court in 1853.

R. H. Dana, Jr., for the plaintiff, called on the court to overrule *Loomis v. Newhall*, and cited *Irvine v. Stone*, 6 Cush. 508, and *Wood v. Benson*, 2 Cr. & J. 94; also contending that the question whether the agreement to pay for the prior work was within the statute of frauds, should have been left to the jury. *Sinclair v. Richardson*, 12 Vt. 33; *King v. Despard*, 5 Wend. 277; *Nelson v. Boynton*, 3 Met. 402.

Wheeler relied on *Loomis v. Newhall*, and cited *Lord Lexington v. Clarke*, 2 Vent. 223, and *Chater v. Beckett*, 7 T. R. 201, on which that case was decided.

The opinion of the Court was delivered by

METCALF, J. — The instruction given to the jury, that the evidence offered by the plaintiff would not authorize them to find a verdict for him, must have proceeded upon the ground that an agreement, which is void in part by the statute of frauds, is void *in toto*. And so it was decided in *Loomis v. Newhall*, 15 Pick. 159, on the authority of *Lord Lexington v. Clarke*, 2 Vent. 223, and *Chater v. Beckett*, 7 T. R. 201. The question, therefore is, whether that decision is right. And we are all of opinion that it was wrong, and must be overruled. The grounds of this opinion are briefly stated in *Irvine v. Stone*, 6 Cush. 508. And though what was there said on this point, was not essential to the decision of that case, yet it was the result of a considerate examination of the principles which are uniformly applied in analogous cases, and of the latest adjudications on the precise point now in judgment. A renewed examination of those principles and adjudications has confirmed the opinion there expressed.

It is unnecessary to refer to any adjudged case besides that of *Wood v. Benson*, 2 Crompt. & Jerv. 94, and 2 Tyrw. 93, which is not distinguishable from the case before us. In that case the previous decision in 2 Vent. 223, and 7 T. R. 201, and *Thomas v. Williams*, 10 Barn. & Cres. 664, were all considered by the Court of Exchequer, and were held to have been rightly decided upon the ground of a variance between the declaration and the proof. In the first and third of those cases there was only a single count in the declaration, viz., a special count setting forth the whole agreement alleged to have been made by the defendant. In the language of Bayley, B., 2 Crompt. & Jerv. 100, the declaration in each of those cases stated the entire promise, as well that part which was void, as that which was good. I think, therefore, that these cases are to be supported on the principle of failure of proof of the contract stated in the declaration; but that they do not establish, that if you can separate the good part from the bad, you may not enforce such part of the contract as is good. In the case in 7 T. R. 201, there was, in addition to the special count on the entire promise, a count for money paid by the plaintiff to the use of the defendant. But it was held without reference to the statute of frauds, that the evidence did not support that count. Lord Lyndhurst said, 2 Crompt. & Jerv. 98, 99: "The case of *Thomas v. Williams* may, as it appears to me, be supported. Part of the contract in that case was void by the statute of frauds. The declaration stated the entire contract, including that part of it which was void; and therefore the contract, as stated in the declaration, was not proved. The same observation applies to *Lexington v. Clarke*, and *Chater v. Beckett*, and I have no disposition to complain of those decisions, because, in none of those cases does there appear to have been any count upon which the plaintiff could recover."

In *Wood v. Benson*, there was not only a special count on the entire agreement, but also a count for goods sold and delivered. And it was decided that, on this last count, the plaintiff was entitled to recover for the goods sold and delivered after the defendant's promise to pay for them. In the case at bar, there is no special count on the defendant's agreement, but the general *indebitatus* counts only are inserted in the declaration. And the plaintiff may recover on such counts, after the terms of a special agree-

ment are performed by him. This has been the settled law since the decision in *Gordon v. Martin*, Fitzgib. 302.

If there had not been a general as well as a special count, in *Loemis v. Newhall*, the decision in that case might have been sustained by the authorities on which it was made. There would have been a variance or failure of proof. But as there was a general count, the case was erroneously decided.

The analogies of the law confirm our views in this case, and the decisions in *Wood v. Benson*.

In early times, it was held that an award, if bad in part, was wholly bad. But it has long been settled, on satisfactory grounds, that the general validity of an award is not impaired, though some things, which the arbitrator appoints to be done, are impossible, unreasonable or unlawful, unless "by the particular defect, a mutuality of interest and advantage, appearing evidently to have been intended by the arbitrator to be given, is destroyed, or when the general substance of the award and the real justice of the case are affected." — Caldwell on Arb. 1st Am. ed. 120.

In contracts which are not affected by statute provisions, the doctrine always has been as it was announced by Hutton, J. in *Bishop of Chester v. Freeland*, Ley. 79: "At the common law, when a good thing and a void thing are put together in one self-same grant, the same law shall make such construction, that the grant shall be good for that which is good, and void for that which is void." See also, *Newman v. Newman*, 4 M. & S. 66.

It is said in many of the books, that if any part of an agreement is contrary to a statute, the whole is void; though it is otherwise, where part only is contrary to the rules of the common law; that "a statute is like a tyrant; where he comes he makes all void." But this never was true. This expression seems to have been used by Lord Hobart, when speaking of the statute of 23 Hen. 6, which prescribed the form of a bail bond, and made, in express terms, any obligation, in other forms, void." Hence in *Norton v. Simmes*, Hob. 14, it was resolved that "if a sheriff will take a bond for a point against *that law*, and also for a due debt, the whole bond is void; for the letter of *the statute* is so; for a statute is a strict law. But the common law doth divide according to common reason, and having made

that void, that is against law, lets the rest stand." See *Kerrison v. Cole*, 8 East, 236, 237.

On principle, and according to numerous modern adjudications, the doctrine is this: If any part of an agreement is valid, it will avail *pro tanto*, though another part may be prohibited by statute; provided this statute does not, either expressly or by necessary implication, render the whole void; and provided, furthermore, that the sound part can be separated from the unsound, and be enforced without injustice to the defendant. See opinion of Gibbs, C. J. in *Doe v. Pitcher*, 6 Taunt. 369; and *Gaskell v. King*, 11 East, 165; *Wiggin v. Shuttleworth*, 13 East, 87; *Howe v. Synge*, 15 East, 440; *Mongs v. Leake*, 8 T. R. 411; *Greenwood v. Bishop of London*, 5 Taunt. 727. In the application of this doctrine Chancellor Kent says: "If the part which is good depends upon that which is bad, the whole instrument is void; and so I take the rule to be, if any part of the consideration be *malum in se*, or the good and the void consideration so mixed, or the contract so entire, that there can be no apportionment." 2 Kent, Com. 7th ed. 591, 592. The application of this doctrine to cases affected by the statute of frauds, and similar statutes, will be found in *Mayfield v. Wadsley*, 3 Barn. & Cress. 357, and *Wood v. Benson*, before cited; where one part of the agreement was held to be separable from the other; and in *Cooke v. Tombs*, 2 Anst. 420; *Lea v. Barber*, 2 Anst. 425, note; *Meshelen v. Wallace*, 7 Adolph. & Ellis, 49; *Vaughn v. Hancock*, 3 Man. Grang. & Scott, 766; *Irvine v. Stone*, 6 Cosh. 508, and *Biddell v. Leeder*, 1 Barn. & Cress. 327; where it was held that the different parts of the agreement could not be separated.

New trial ordered.

Court of Common Pleas, Suffolk, ss., April Term, 1854.

BEFORE HOAR, J.

JOHN RAND *et al.* v. O. H. MATHER.

Evidence — Auditor's Report — Statute of Frauds — Contract.

A NEW trial having been ordered in the foregoing case in the Court of Common Pleas as above stated, it was referred to Geo. S. Hillard, Esq., as auditor, to report upon

the items. At the hearing before Mr. Hillard, evidence was gone into, on both sides, as to the relations of the parties and Whiston, with reference to the effect of the statute of frauds. When evidence of the amounts of the items was offered, the defendant's counsel agreed that the items were correctly charged, and that the defendant, if liable at all, was liable for the amount charged, the plaintiff waiving his claim for the prior work.

The auditor reported the evidence, and the principle of law which he considered as governing the case, and also that the parties had agreed before him upon the items. The rule he reported as follows: that "the plaintiff is bound to show that the contract between him and Whiston was rescinded, and a new and independent contract was made between him and the defendant, and that the plaintiff ceased to regard Whiston as a debtor and looked solely to the defendant;" and, as the plaintiff had failed to satisfy him that the contract with Whiston was rescinded, he reported that the defendant owed nothing to the plaintiff.

Mr. Dana objected to the report, on the ground that as the items were agreed upon, there was no proper duty for the auditor; and that his report upon the rule of law and its application to the evidence was incorrect and beyond his jurisdiction, even if the items had not been agreed upon, and cited *Rev. Stat. 96, sect. 25*; *Allen v. Hawks*, 11 Pick. 359; *Whitwell v. Willard*, 1 Met. 216; *Jones v. Stevens*, 5 Met. 373.

Mr. Wheeler relied upon the report, as *prima facie* evidence, and cited *Bradley v. Clark*, 1 Cush. 293; and *Locke v. Bennett*, 7 Cush. 445.

HOAR, J. ruled, that although the parties had agreed on the items, yet, as the evidence had been opened fully to the auditor before this agreement, the report should stand as to the general result, but struck out so much as related to the rule of law.

The case then proceeded to trial, the defendant putting in the report.

Mr. Dana asked the court to rule, (1), that if the contract between the plaintiff and Whiston did not subsist, the question under the statute of frauds did not arise. (2), If that contract did subsist, it was then for the jury to say whether the leading object and motive of the parties was the paying or securing of Whiston's debt, or a new

contract by which the plaintiff should work for the defendant, on his liability, irrespective of Whiston's obligation; and that if the latter, the defendant would be liable, although this undertaking should effect the payment of Whiston's debt. *Nelson v. Beynton*, 3 Met. 402.

HOAR, J., instructed the jury that the only question for them was, for whom was the plaintiff working? If he was working for Whiston, under Whiston's control, in pursuance of the original contract with him, on the security of the defendant, he could not recover. But if he was working for the defendant, on his primary and absolute liability, he could recover; whether, while this new contract was in course of execution, the old contract with Whiston had a legal subsistence or not. The plaintiff and defendant might have treated it as subsisting in favor of the plaintiff, at his option, and not in favor of Whiston, or as not subsisting at all, or they might have made their contract utterly irrespective of the question of its subsistence. If it did not subsist, the question under the statute did not arise. Its subsistence was a test negatively, but not affirmatively.

The jury found for the plaintiff. No exceptions were taken to their rulings, and other cases against the defendant, depending on the same state of facts, were settled.

Miscellaneous Intelligence.

FIRE INSURANCE.—A case of considerable interest in the law of fire insurance was reported last week. B., in California, sent to his London agent a description of a building in California to be insured against fire. The description stated among other things that "the house was composed of two stories without a basement story." This description was correct when it was written; but B. afterwards, and before the policy was issued, added a third story to his house. The policy was effected on "a brick building used as a dwelling-house and store, described in a paper attached to this policy." The paper so attached mentioned the description forwarded by B. to his agent. In an action on the policy it was held, first, that the description of the premises in the policy amounts to a warranty that they were of that description, or a least that the premises should not be altered in the interim so as to increase the risk. Second, that it was a warranty by the assured that he would not do anything to alter the condition of the building and so to increase the risk. Thirdly, that the risk was increased and the warranty broken by converting the house into a three-storied one. *Silk v. Thornton*, 23 L. T. Rep. 187. — *Law Times*.

Notices of New Books.

THE PUBLIC STATUTES AT LARGE OF THE STATE OF OHIO, from the close of Chase's Statutes, February, 1833, to the present time; arranged in chronological order, with references to the judicial decisions construing those statutes: And a supplement, containing all laws passed prior to February, 1833, which are now in force. Edited by **MASKELL E. CURWEN**, of the Cincinnati Bar; one of the Professors of Law in the Cincinnati College. In three volumes. Vol. I. pp. 1-859; Vol. II. pp. 853-1706; Vol. III. 1707-2736. Cincinnati: Published by the author. 1853, and 1854.

THE STATUTES OF THE STATE OF OHIO, of a general nature, in force at the present time, with notes and references to judicial decisions thereon. Edited by **MASKELL E. CURWEN**. Complete in one volume. pp. 1683. Cincinnati: C. A. Morgan & Company. 1854.

Upon the appearance of the first volume of Mr. Curwen's edition of the Ohio statutes, we gave it an extended notice, 15 L. R. 703. We said, "The chief merit of the book is the scrupulous care and fidelity with which the volume seems to have been prepared. The marginal abstracts of the sections are faithfully as well as succinctly made; the notes of judicial decisions upon the several statutes are brief but clear, and embrace all the leading cases; the references from one statute to others upon the same subject-matter, are exact; in a word, the volume appears to be one, in the accuracy of which the fullest reliance may be placed."

We have examined with considerable care the second and third volumes of Mr. Curwen's edition, and we think that the commendation bestowed upon the first volume should be extended to the subsequent ones. His editorial duties have been intelligently, laboriously and faithfully performed. We cannot recall any collection of statute law more perfectly made than this; and that, too, where the legislation was peculiarly conflicting and discordant. Symmetry and proportions have been given to what was shapeless and without form. A slight glance shows that a superior intellect planned, and an extraordinary accuracy, supervised, the work.

We beg our readers not to think that we are extravagant in our praise of these volumes, for we are speaking only the words of truth and soberness. A good compilation of statute law is a blessing, and the compiler a benefactor to the profession. In ordinary treatises, imperfections and errors are of less consequence, for we have ready means of detecting and curing them, in the sources of law which we are supposed to know, and from the streams, with whose general current we are familiar. But who can say *a priori* whether the phraseology of a statute is correct? Therefore it is, that when we have in a readable shape, the body of the statutes of a State, which we can rely upon as complete, and the text of which we can have confidence in as accurate, and the whole made readily accessible by a copious, and thoroughly prepared index, we are under especial obligations to the intelligent and vast labor that is saving us daily anxiety and toil.

The third volume, which was published this year, the first and second coming last season, has an index, to which we would especially refer as a model. Mr. Curwen has evidently acted upon his idea of how such an index should be made; for he tells us in his preface, "in preparing it, the

writer's aim should be to imagine himself in the position of as large a mass of readers as he can, and index as though he wrote especially for each one of them." The labor to the compiler is greater, and the expense to the publisher is increased, but our daily toil is less.

In no portion of the work has Mr. Curwen spared any labor. Proofs have been read with scrupulous care, and references vigilantly verified. The fullest credit is also given for all assistance. We cannot forbear quoting a paragraph, the italics in which are our own, from the preface to the third volume, to show the nice sense of honor, with which, lawyer-like, Mr. Curwen has discharged his labors; nor can we refrain from expressing great surprise that any one—publisher or author, should attempt or permit anything that could, in any form, interfere with a great public work like this. "Credit has already been given in the first volume, to the very laborious and accurate edition of the statutes of 1841, by Judge Swan, for the aid it afforded. It is just to add that the announcement of an intended new edition of that work, on the day after the first volume of this was published, checked, and after the announcement was confirmed by Judge Swan, stopped a further use by the editor of his materials, the few notes which were in the hands of the printers, being allowed to appear. That work had been prepared in the course of official duty; was not copyright; had become substantially superannuated by subsequent legislation; and there appeared no probability of its coming to a second edition. But when it was ascertained that the author of it might render those materials available by incorporating them in a new edition, *a higher law than that of copyright forbade a diminution of their value for such purposes.*"

The reader will perceive from the title, the difference between the fourth volume at the head of this notice, and the three preceding volumes. The three volumes form a work by themselves, and give the Public Statutes—not only those now in force—but those which have been repealed; while the latter gives only the general statutes in force—thus being a hand-book for daily use. To ascertain the terms of any statute, the latter is sufficient, while to study the laws of the State, a comparison of the previous enactments contained in the former volumes is necessary. The same completeness and accuracy characterize this volume, and it has the same index. It brings down the statute law of Ohio to the present time; and adds thereto notes of the judicial decisions of its courts, the preparation of which "show not merely the compiler, but the able and discriminating lawyer."

We cannot speak too highly in commendation of these volumes; and for proof, we refer our readers to the volumes themselves.

GIBBS' PRACTICAL FORMS AND PRECEDENTS, for Lawyers, Commissioners, Notaries, Justices of the Peace, Conveyancers, &c., in all the States of the Union, with FORMS AND INSTRUCTIONS for the execution and authentication of deeds for all the States; Forms for Taking, Certifying, and Returning Depositions of Witnesses for all the States; the Laws relating to the Collection of Debts in all the States; the Exemption Laws of each State; the Statute of Limitations of each State; Legal Rates of Interest and Penalties for Usury in each State; Complete Forms and Instructions for procuring Patents, with a Digest of Patent Decisions; Forms and Instructions for procuring Bounty Lands, with all the Acts of Congress; Forms and Instructions for Notaries Public; Digest of Decisions in relation to Bills and Notes, protests and the powers and duties of Notaries Public. By MONTGOMERY GIBBS, of the New York Bar, Notary and Commissioner for the States. 1 vol. 8vo.

pp. 279. Second Edition. New York: Lewis & Blood, Law Book-sellers and Publishers, 73 Nassau Street, 1854.

The idea that so much as is indicated by the above voluminous title page, with the addition of "Complete and Accurate Interest Tables computed at six and seven per cent," which, though in the book, are not enumerated thereon, should be comprised within less than 300 pages, would challenge criticism, did not Mr. Gibbs in a very modest and proper preface inform us, that the volume, the first edition of which, prepared for his own private professional use, was printed for gratuitous distribution, has been published at the urgent solicitation of many respectable members of the profession. A vast amount of information of more or less constant use to the lawyer in his daily practice, is collected, and perhaps with general accuracy. It would be strange in collecting the provisions of the several statutes of so many States, if there were not many errors. We would suggest that in future editions, the date of every statute of each State that is referred to be given; if so, the labor of verification, and of ascertaining whether there have been subsequent alterations, will be materially lessened. The book is well worth its price to every lawyer.

A FULL AND ARRANGED DIGEST OF THE DECISIONS IN COMMON LAW, EQUITY, AND ADMIRALTY OF THE COURTS OF THE UNITED STATES, from the organization of the Government in 1789 to 1847, in the Supreme, Circuit, District, and Admiralty Courts, reported in Dallas, Cranch, Wheaton, Peters and Howard's Supreme Court reports; In Gallison, Mason, Paine, Peters, Washington, Wallace, Sumner, Story, Baldwin, Brackenbrough, and McLean's Circuit Court Reports; and in Bee, Ware, Peters, and Gilpin's District and Admiralty Reports. By RICHARD PETERS, Counsellor at Law. With an Appendix containing the rules and orders of the Supreme Court of the United States, and the rules of the Circuit Court of the United States in proceedings in Equity, established by the Supreme Court. In two volumes. Vol. I. pp. 819. Vol. II. pp. 779. New York: Lewis & Blood, Law Book-sellers. 1854.

This is an old friend with a new face. Peters's Digest, though limited, is a very good book and well known to the profession. It stands in good stead of the series of United States Court Reports down to 1847, of which it gives pretty full abstracts.

New Publications received.

ENGLISH REPORTS IN LAW AND EQUITY; containing Reports of Cases in the House of Lords, Privy Council, Courts of Equity and Common Law, and in the Admiralty and Ecclesiastical Courts; including also cases in Bankruptcy, and Crown Cases reserved. Edited by EDMUND H. BENNETT and CHAUNCEY SMITH, Counsellors at Law. Vol. XXI. Containing cases in all the Courts of Chancery during the year 1853. Vol. XXII. Containing cases in all the Courts of Common Law, and in the Admiralty and Ecclesiastical Courts, during the years 1853, '54. Boston: Little, Brown & Company. 1854.

THE RENDITION OF ANTHONY BURNS. By WILLIAM I. BOWDITCH. 8vo. Paper. pp. 40. Robert F. Wallcut, 21 Cornhill. 1854.

CHARGE TO THE GRAND JURY, at the July Term of the Municipal Court in Boston, 1854. By E. R. HOAR, one of the Justices of the Court of Common Pleas of Massachusetts. Published by request. Paper. 8vo. pp. 22. Little, Brown & Company.

Obituary Notice.

DIED in Cambridge, Mass., June 23, 1854, Hon. DANIEL WELLS, Chief Justice of the Court of Common Pleas, aged 68.

Judge Wells was born in Greenfield, Mass., graduated at Dartmouth in 1810; studied and practised law at Greenfield until 1849, when he was made Chief Justice of the Common Pleas. In 1837 he was appointed District Attorney for the Western District, and discharged the duties of that office with marked ability, propriety, and success, until his appointment as Chief Justice. His death was sudden, and was caused by a disease of the heart. He had held the Municipal Court for three consecutive and laborious terms, and had presided therein on the 22d June. Late in the evening of that day he left the court-room for his home in Cambridge, apparently in perfect health; was attacked during the evening after reaching his residence, and died the next day near one o'clock. He leaves a widow, two sons and three daughters.

We give below the proceedings before the Courts and of the Bar in Suffolk and Berkshire.

On Monday morning, June 26th, at the coming in of the Municipal Court, Judge HOAR presiding, the Commonwealth's Attorney brought the death of Chief Justice WELLS officially to the notice of the Court, and moved an adjournment. In ordering an adjournment Judge HOAR said: "It is with emotions the most profound that I find myself thus occupying the seat of him who has been so lately and suddenly summoned from the scene of his duties here to that higher tribunal, where the accuser and the accused, the judge and the criminal, must alike appear and answer for the deeds done in the body. He was the honored and beloved head of the court of which I am a member. In the course of his long and useful life, he rose to professional eminence, and did much service to the State. He was a learned and successful lawyer, and an upright Judge. He was the steady friend of public improvement, of sound morals, and of social order. And to all of us, his associates and friends, it will be a cause for the deepest satisfaction if, when called like him to end our earthly labors, we can feel that we have been enabled to imitate his conscientious fidelity to duty, the purity of his life, and the kindness of his heart."

On the same day at 12 o'clock, there was a very full meeting of the Suffolk Bar in the Law Library. The Commonwealth's Attorney for Suffolk county stated the purpose of the meeting, and on motion, Hon. Charles G. Loring was chosen Chairman, and John S. Holmes, Esq. Secretary.

Upon taking the Chair, Mr. LORING paid a brief but just tribute to the memory of the deceased, and said that in his death all good men and the Commonwealth had sustained a great loss; that he was a lawyer of profound learning, and that he was particularly distinguished for his high sense of honor, and for his fearless independence of public opinion.

Hon. GEORGE S. HILLARD offered the following resolutions:—

Resolved, That the members of the Suffolk Bar have learned with deep regret the sudden death of the Hon. DANIEL WELLS, late Chief Justice of the Court of Common Pleas; while in his life and in the honorable distinction which crowned it, they recognize the legitimate fruits of those moral and intellectual qualities by which alone the law and the bench can earn and keep the confidence and esteem of the community. When at the Bar, he was distinguished by industry, attention to the interests of his clients, unwearied patience in the investigation of legal questions, and a fairness and candor of mind, which gave him the ear of the Court and the jury. His elevation to the bench met the hearty approval of all who

had observed his professional course. As a magistrate, he was faithful, cautious, patient and courteous, with sufficient learning and conspicuous industry; more anxious that justice should be done, than that business should be hastily dispatched; listening long and pondering carefully; making no distinction of persons; encouraging the young by a paternal kindness of manner; ever thoughtful of the rights of all; and invariably loyal to duty.

Resolved, That we honor and respect the private life of Mr. Chief Justice Wells, the unspotted integrity which guided his steps through his whole career, the gentleness of spirit which resisted the hardening influences of professional life, the kindness of heart which was so conspicuous in his nature and bearing, the warmth and depth of his domestic affections, and the sincerity and vitality of his religious faith.

Resolved, That a copy of these resolutions be transmitted by the secretary to the family of the deceased, and that the District Attorney be requested to present them to the Court of Common Pleas at its next session in this county, with a request that they be entered upon its record.

Geo. T. CURTIS, Esq., formerly a student in Judge Wells's office, R. F. FULMER, Esq., Hon. J. C. PARK, Hon. THOMAS HOPKINSON, and Hon. B. F. HALLETT, severally addressed the meeting, after which the resolutions were adopted.

On motion of Hon. B. F. Hallett, a committee consisting of George P. Sanger, George T. Curtis, B. F. Hallett, and Lemuel Shaw, Jr. was appointed to take measures to procure a portrait of the late Chief Justice, to be placed in the Law Library, or be otherwise disposed of as the members of the Bar may direct.

On the coming in of the Court of Common Pleas for Suffolk county at the July Term, Judge HOAR presiding, the Commonwealth's Attorney presented to the Court the foregoing resolutions, and upon his motion, Judge HOAR ordered that they be entered upon the records of the Court.

PROCEEDINGS IN BERKSHIRE.

At a meeting of the members of the Berkshire Bar, held on Tuesday, June 27, 1864, to take such measures as might be thought proper to express their sentiments of respect and esteem for the late Chief Justice of the Court of Common Pleas, after eloquent and feeling addresses from Mr. Sumner and other gentlemen of the Bar, a committee was appointed, consisting of Hon. Increase Sumner, Hon. Henry L. Dawes, and Charles N. Emerson, Esq., who subsequently reported the following resolutions, which were unanimously adopted.

Resolved, That the members of the Berkshire Bar receive with deep sensibility, the intelligence of the recent sudden decease of the Honorable Daniel Wells, late Chief Justice of our Court of Common Pleas, a station which he had held for many years prior to his death, and the responsible, important, and arduous duties of which he had ever faithfully and ably discharged.

Resolved, That while we most earnestly and cheerfully accord to the sentiments of respect which it is believed every where in this Commonwealth prevailed towards Judge Wells, we may, as we believe, justly claim, from our peculiar relations with him, deeper emotions and stronger regrets at his departure, than by others less associated with him, could be entertained. For many years before his appointment to judicial office, he was a practitioner in his profession at the Bar of this County. Most of us have witnessed his efforts to acquire the character and qualifications he so successfully attained, and so well illustrated. In the outset, we saw in him the lover of truth and of justice, and we witnessed how ardently and how properly he strove to acquire the public confidence and good will. He was sincere in thought and deed. He was upright in all his purposes. He was of clear intellect — a learned counsellor — a good man — a just

judge — and his departure now, at the maturity of his age and capacities, is an immeasurable public loss.

Resolved, That we deeply sympathize with the family of the deceased, in the afflictive dispensation now upon them by reason of this visitation of Providence.

Resolved, That a copy of the excellent and appropriate address of His Honor Judge BYINGTON, delivered to the Bar at this term, relative to the character of Judge WELLS, be requested, and that it be published together with these resolves in the Law Reporter — and that a copy of these resolutions be forwarded to the family of the deceased.

M. B. LANCETON, *Chairman*.

HENRY W. TAFT, *Secretary*.

The following are the remarks of Judge BYINGTON, referred to in the above resolutions.

After the assembling of the Court of Common Pleas, on Tuesday, the 27th day of June, Judge BYINGTON delivered the following address :

GENTLEMEN OF THE BAR, — The Court will adjourn its proceedings to another day. This is the day designated for the performance of the funeral rites of him, who has been the Chief Justice of this Court for the last ten years. His mortal remains are now on their way from the place of his residence and of his decease, in Cambridge, to that of his birth, in Greenfield, attended by a beloved family, now smitten with grief, who only five days since, had as little apparent reason as any of us for the apprehension of the mortal stroke that would bring upon them this great calamity.

It is fitting that we pause, — that the litigation of suitors, and the thoughts and cares of business give place to a sentiment of regard and respect for the deceased, of sympathy for his afflicted family and friends, and to a contemplation of our own relation to that great event, which must, in a very few brief years, close the life of us his contemporaries, as it now has that of our lamented friend, the Chief Justice of this Court.

It was only last Thursday, the 22d inst., that he left the Municipal court-room, after holding a session to a late hour, in apparent health. On his way home he felt the force of that blow which terminated his life. For suddenness and intensity, the pain he suffered seemed like the result of violence to his person.

He was seized with acute pain in his chest. On arriving home, for a few moments he felt a little relief, and attempted to take his tea, but with the attempt the pain returned in all its violence, and continued through the night. At the early dawn it began to subside, and continued to abate, until he was almost wholly relieved. The fears of his family were tranquillized. Hope revived in them, but not in him. From the first he expected death. He remained quiet till nearly two o'clock in the afternoon, then rose from his bed and sat a little while in his chair, but feeling too weak to remain he returned to his bed. His wife retired a few feet from him, after adjusting his bedclothes, to leave him to repose ; but soon perceiving some motion, she returned to him. He tried to speak, but could not, and in a few moments ceased to breathe. It was thought by his physicians that his death was caused by a disease of the heart. No doubt his severe labors in the performance of official duties accelerated his disease and hastened his death. From various causes the labors of the judges of this Court have been much increased the last year. He had been constantly in Court since the first of January, with the exception of one week, and the last fortnight he was engaged from an early to a late hour in the impure atmosphere of the Municipal Court-room in Boston.

Chief Justice WELLS was born in Greenfield, and there spent the greatest portion of his life. He was educated at Dartmouth College, where he graduated in 1810. He commenced and continued the practice of his profession in Greenfield until his appointment by Gov. Briggs, in 1844, to the office which he held at his death, on the 28d of June, 1854, in the 63d year of his age.

In 1837, upon the appointment of Judge Dewey to be one of the Justices of the Supreme Judicial Court, Judge Wells was appointed his successor in the office of District Attorney for the Western District. This office required his attendance upon the courts in this county, and from that period most of the members of the bar of this county, then in practice, formed an intimate acquaintance with him. They formed a social connection also, which was one of mutual pleasure and advantage. We were witness of the manner in which he performed his duties, and believe he produced the universal conviction here, that he was an able and learned lawyer, a thoroughly upright and honest man; that he performed his official duties with great fidelity, ability, and to the entire satisfaction of all, except those who felt the influence of his power in bringing them to that justice their offences deserved.

Of an exceedingly humane disposition, he never contended for victory without regard to the right. The love of truth was stronger than the love of victory; the sense of duty greater than the love of fame. He was quick to perceive when a dishonest defence was made, or false pretences presented for leniency, and powerful and effective to defeat all such attempts to prevent justice. He had not the graceful action or melodious tones of the accomplished orator, but rather produced conviction by the perspicuous analysis and arrangement of the evidence in a cause, and by cogent argument. The rights of the accused were always preserved by him, neither the innocent, or those not proved guilty, were convicted; but those who were guilty seldom escaped punishment.

For two or three years after his appointment as Chief Justice, with you, I, as a member of the bar of this county, was a witness of the manner in which he performed the duties of his new office. We all know that he had the requisite knowledge and intellectual power for his position; but great learning and great success at the bar are not always proofs that a man will be either acceptable or successful as a judge. He held several terms here, and one or two long ones, soon after his appointment — one the longest ever held in this county; and such was the appreciation of his services by the bar and the juries, that they expressed their satisfaction and approbation by resolutions, which they published at the time.

He soon after removed from this part of the Commonwealth, and did not often hold our terms. My position has for the last six years deprived me of the means of knowledge of the manner in which he has discharged the duties of his office, except from the relations of others.

The duties of the members of this Court keep them apart. Only at two terms in the year they are brought together. But I can truly say of him, of my own knowledge, that he was a learned judge, upright in his purposes, conscientious and indefatigable in the performance of his duties, with a strong desire that truth should be established and justice be done. He had tender sympathy for the criminal, especially the juvenile offender, yet was firm in enforcing the sentence of the law. And when we shall find honesty and a love of truth, and a desire to establish it, prevail in all connected with trials, we shall have but little cause to fear that justice will not be done. If the judge be upright; if the counsel examine the witness with a view to get the whole truth, that which operates against, as well as in favor of his client; if, in his arguments, he consider not only what may, but what should, properly influence the triers, and address only the latter considerations to them; if parties would admit all facts known to them to be true, and witnesses would not be found base enough to utter falsehood, justice would not only be done, but the necessity of enforcing it by means of courts, would be very much lessened.

That the judicial character of the chief justice was not perfect, — that he sometimes made mistakes in the manner in which he conducted the business of his court, there can be no doubt. He was only a man. He may have erred more than some, and less than others. No man, however eminent, has held for a long time the office of judge, or indeed of any responsible station, without having committed some mistakes and errors. No judge, however eminent, has escaped calumny and detraction. There are always a few

who delight to see imperfections in others, or to impute them where they do not exist. But almost all are disposed justly to appreciate the character and services of the magistrate, to render him the justice that is his due. To do this, it is not required that his failings, or his mistakes, or errors, should be overlooked. Of the private life of Chief Justice Wells, of his social spirit, his frankness and simplicity, his true love of mankind, his warm sympathy and strong interest in every thing that had a tendency to improve society, of his truly religious character, I need not speak to you. We know that he possessed the cardinal principles and sentiments which form the good man.

May all concerned in the administration of justice, or in the duties of life, be as pure in spirit as he was. We shall then have nothing to fear for ourselves or our country.

Insolvents in Massachusetts.

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Commissioner.
Allen, Alfred	Dedham,	July 8, 1854,	Francis Hilliard.
Barron, William B. et al.	Fitchburg,	" 19,	A. H. Bulloch.
Bell, Henry H.	Lowell,	" 27,	Isaac B. Morse.
Bridges, James A.	Williamstown,	June 22,	Shepard Thayer.
Bridges, Orin O.	Florida,	Aug. 8, 1853,	Shepard Thayer.
Bridgman, Edward	Williamsburg,	July 8, 1854,	Haynes H. Chittson.
Brown, Ralph E.	Boston,	" 12,	John P. Putnam.
Campbell, Isaac	Boston,	" 12,	John P. Putnam.
Chapin, George A.	Roxbury,	" 17,	Francis Hilliard.
Coates, John H.	Winchester,	" 1,	Asa F. Lawrence.
Coolidge, B. F. B. et al.	Lynn,	" 19,	John G. King.
Darling, Henry	North Adams,	Oct. 23, 1853,	Shepard Thayer.
Davenport, Edward W.	Mendon,	July 15, 1854,	A. H. Bulloch.
Davis, Gilman	Roxbury,	" 17,	Francis Hilliard.
Deany, H. Walford, et al.	Leicester,	" 25,	A. H. Bulloch.
Doherty, Frank, et al.	Boston,	" 25,	John P. Putnam.
Doherty, William K. et al.	Boston,	" 25,	John P. Putnam.
Dolen, Bartlett, et al.	Sheffield,	" 14,	Charles N. Emerson.
Dutcher, John J.	North Adams,	Dec. 20, 1853,	Shepard Thayer.
Dyer, Samuel L.	Braintree,	July 27,	Samuel B. Noyes.
Forbush, Edwin A. et al.	Ashland,	" 6,	Asa F. Lawrence.
Forbush, James E. et al.	Ashland,	" 6,	Asa F. Lawrence.
Goodridge, William	Danvers,	" 12,	John G. King.
Granger, George W.	Winchendon,	" 21,	C. H. B. Snow.
Harlow, James	Middleborough,	" 23,	Welcome Young.
Hayden, Rubin B.	North Adams,	" 15,	Shepard Thayer.
Henderson, Samuel, et al.	Lynn,	" 19,	John G. King.
Holman, William F. et al.	Leicester,	" 25,	A. H. Bulloch.
Howard, A. G. et al.	Fall River,	Date not ret'd	Edmund H. Bennett.
Howes, Erastus F.	North Adams,	Feb. 14, 1854,	Shepard Thayer.
Johnson, Alfred V.	Sharon,	July 13,	Samuel B. Noyes.
Lord, Samuel	Lynn,	" 12,	John G. King.
Lynch, John P.	Boston,	" 17,	John M. Williams.
Mansfield, Albert, et al.	Sheffield,	" 14,	Charles N. Emerson.
Martin, Richard	Boston,	" 17,	John P. Putnam.
Powers, Eli	Somerville,	" 14,	Asa F. Lawrence.
Pratt, Augustus, W. et al.	Fitchburg,	" 19,	A. H. Bulloch.
Pray, Aaron W.	Natick,	" 31,	Asa F. Lawrence.
Reed, Lucius E.	Boston,	" 19,	John P. Putnam.
Richards, Cellus E.	Attleborough,	" 12,	E. P. Hathaway.
Richards, Edwin A.	Braintree,	" 18,	Francis Hilliard.
Root, Graham A. et al.	Sheffield,	" 14,	Charles N. Emerson.
Russell, Andrew	Westborough,	" 4,	A. H. Bulloch.
Sawyer, B. F.	Mansfield,	Aug. 3,	E. H. Bennett.
Soule, Calvin P.	Boston,	July 13,	John P. Putnam.
Thayer, Jonathan M.	Randolph,	" 15,	S. B. Noyes.
Turner, Francis A.	Boston,	" 24,	John P. Putnam.
Wheeler, Lincoln, et al.	Fitchburg,	" 19,	A. H. Bulloch.
Whitman, Jerome	Westchester,	" 25,	C. H. B. Snow.
Whitney, Augustine	"	" 25,	C. H. B. Snow.
Wiggin, Joseph	Roxbury,	" 25,	Francis Hilliard.
Winslow, Nathan, et al.	Fall River,	Date not ret'd	Edmund H. Bennett.
Woodman, Archibald	Randolph,	July 23,	Francis Hilliard.
Woodman, William H.	Lynn,	" 27,	John G. King.

THE

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OCTOBER, 1854.

THIRTY YEARS IN THE UNITED STATES SENATE.*

MR. BENTON'S "Thirty Years in the United States Senate" has, by this time, reached the libraries of many statesmen and politicians of the country. By most of them it was sought for with eagerness, and has been read with interest and gratification. The author, who was once a lawyer, and for a long time a law-maker, though never a law expounder, has probably been known to more of our citizens, and been intimately acquainted with more of our distinguished men, than any other individual among us. Thirty years of uninterrupted service in the highest branch of our national legislature, has afforded him an opportunity, which no other man has enjoyed, to become acquainted with human nature, with the science of government, if there be such a science, and with all the interests, domestic and foreign, of the nation; and it indicates the possession of uncommon talents, and of unwavering fidelity in the exertion of those talents to the interests of his constituents. It has never had, and will never be, a precedent.

If he has his peculiarities and foibles, he has, or he has done something also, which has given him a hold upon the veneration and affections of many of the people. As time

* Thirty Years View; or a History of the working of the American Government for Thirty Years, from 1820 to 1850, chiefly taken from the Congress Debates, the private papers of General Jackson, and the Speeches of ex-Senator Benton, with his actual View of men and affairs. D. Appleton & Co. New York, 1854. 8vo. pp. 789.

drapes the forest tree with a mantle of moss, which hides its gnarled branches and the excrescences which disfigure its otherwise shapely trunk,—so white hairs and the well-meant services of a long life, sometimes cover the faults and foibles of men. Let it be so with him.

We cannot follow Mr. Benton through the details of this bulky volume; nor shall we undertake a connected view of the events he discusses. Perhaps our readers may be interested in following our steps as we touch, somewhat unconnectedly and discursively, upon some of the more interesting matters of history or politics, which we find in his work.

Before the commencement of the period of "Thirty Years," Colonel Benton had made himself somewhat conspicuous in the southwestern portion of the Union by his activity in military affairs, and by essays in newspapers. From incidental remarks in his book, we infer that he was born in North Carolina, was related to several distinguished families in that and in the neighboring States, and was, in his youth, a frequent visitor in the family of Gen. Jackson. To give the reader a more intimate knowledge of the man than he may now possess, or might otherwise obtain, we insert here an extract from a chapter at the end of the volume, in which he relates some incidents in his own life and in the life of the General.

"I have said that his appointment in the regular army was a victory over the administration, and it belongs to the inside view of history, and to the illustration of government mistakes, and the elucidation of individual merit surmounting obstacles, to tell how it was. Twice passed by to give preference to two others in the West, (General Harrison and General Winchester,) once disbanded, and omitted in all the lists of military nominations, how did he get at last to be appointed Major General? It was thus. Congress had passed an act authorizing the President to accept organized corps of volunteers. I proposed to General Jackson, [then (1813) a Major General in the Tennessee militia,] to raise a corps under that act, and hold it ready for service. He did so, and with his corps and some militia, he defeated the Creek Indians, and gained the reputation which forced his appointment in the regular army. I drew up the address which he made to his division at the time, and when I carried it to him in the evening, I found the child* and the lamb between his knees. He had not thought of this resource, but caught at it instantly, adopted the address, with two slight alterations, and published it to his division. I raised a regiment myself, and made the speeches at the general musters, which helped to raise two others, assisted by a small band of friends, all feeling confident that if we could conquer the difficulty—master the first step—and get him on the theatre of action, he would do the rest himself. This

* Referring to an incident elsewhere narrated.

is the way he got into the regular army, not only unselected by the wisdom of government, but rejected by it — a stone rejected by the master builders, and worked in by an unseen hand, to become the corner stone of the temple. The aged men of Tennessee will remember all this, and it is time that history should learn it."

Mr. Benton took his seat, as senator from Missouri, at the last session of Congress during Mr. Monroe's first term, (1820-21,) on the admission of that State into the Union. Of course the fierce struggle, which preceded her admission, does not come within his period of thirty years. But he gives a brief history of it in his "Preliminary View," and treats of it again in his second chapter. The few pages which he devotes to the subject, were evidently written long after the time to which they relate, but under the influence of impressions then received and still remaining on his mind. "Slavery agitation," he says, "took its rise during this time, (1819-20,) in the form of attempted restriction on the State of Missouri — a prohibition to hold slaves, to be placed upon her as a condition of her admission into the Union, and to be binding on her afterwards. This agitation came from the North, and under a federal lead." It came from the North, it is true; but where is the proof that it came "under a federal lead?" The eminent author adduces none; the journals of Congress furnish none; the lead was obviously a republican lead; the mover in the House was a republican; no southern federalist followed this lead; some northern federalists refused to follow it; nearly all the republicans of the North, as their feelings prompted and their principles required, voted for restriction. The error of Mr. Benton arose from hints and suggestions scattered among the northern by southern republicans, to produce jealousy and distrust. They had effect on a few only at the time, but afterwards, by constant repetition, caused many to swerve.

In a subsequent page he remarks: "The real struggle was political, and for the balance of power, as frankly declared by Mr. King, who disdained dissimulation." Mr. King spoke for himself only, and, thus speaking, whatever he did say, or admit, was doubtless true, for he was an honorable man; but we do not believe that he said, or meant to say, or thought, that the struggle, on the part of the North, was solely for the balance of power. We have no doubt that with most, possibly all, it was a concurring motive; that with some, who had made politics the business of a long life, it was the chief motive; and it is a

laudable motive, even if the sole motive, when defensive, — but the largest portion, by far, of the delegates from the free States and of their constituents, were actuated by an intense conviction, that slavery is wrong; that it is inconsistent with the fundamental principles of our government, a stain on our national character, an occasion of national weakness, and a hindrance to the prosperity of any State or territory wherein it should be permitted to exist or to enter. We are constrained to say, that nowhere else, in the book, have we met with a passage imputing, as this does, insincerity to the people of the North, so unfounded and exceptionable as this. Is there, then, no sincerity in the voice of Christendom? Is the admission of Randolph nothing, that the literature of the world was against him? By what motives were Washington and Jefferson and Patrick Henry actuated, when they uttered their condemnations of slavery? What feelings moved, what principles guided, the common people of England to demand of their government the abolition of slavery in the West Indies, at a cost of one hundred millions of dollars, to be taken in due proportion from their own pockets? — Dissimulation! If Mr. Benton had stopped a moment to inquire what feeling, yet lurking in some involution of his heart, had prompted his pen to write that word, he would have blotted it out forever.

The Seminole campaign, in which General Jackson chastised the Florida Indians, hung the two Englishmen, Arbuthnot and Ambrister, and took possession of St. Marks and Pensacola, fortified places in Florida, then Spanish territory, must yet remain fresh in the memories of many; and it must be remembered also that, in the next session of Congress, several resolutions were introduced into the House of Representatives, in relation to those transactions, one of which declared that the seizure of St. Marks and Pensacola was contrary to orders, and in violation of the Constitution.

In the long and warm debate which followed, General Jackson's friends maintained that he was authorized by the orders he received from the War Department to enter Florida, and take possession of the places mentioned; and they professed to find sufficient evidence to maintain their position in the documents communicated to Congress. But these documents contained no explicit order or permission to do so, and his supporters were obliged to rely on the

general tenor of the despatches; on a special injunction addressed to the General "to adopt the necessary measures to put an end to the conflict;" and on a declaration, in a letter from the Secretary of War to Governor Bibb, of Georgia, that "General Jackson is vested with full power to conduct the war in the manner he may deem best." On the other hand, the documents contained an order to General Gaines, who preceded General Jackson in the command of the troops, and which was communicated to him, directing that if the Indians, when pursued, should take shelter under a Spanish fort, he must halt, and report to the Department.

Notwithstanding the proof appeared to be strong against General Jackson, the House rejected the resolution of censure by a vote of 100 to 70. It was well known that this vote, though an acquittal, did not satisfy General Jackson; and once at least a report was circulated that he was preparing a publication which would completely justify his conduct. In the work before us, page 169, appears for the first time, "An Exposition of Mr. Calhoun's Course towards General Jackson," which was found among the General's papers after his decease. Its main purpose appears to be to justify his conduct towards Mr. Calhoun, and those who wish to know the causes assigned by him for the rupture, will do well to consult the "View;" but we find in the Exposition certain documents and statements in regard to the Seminole campaign, at which time Mr. Calhoun was Secretary of War, which we presume will be more interesting to most of our readers.

First among the documents in relation to this subject, is the copy of a confidential letter from General Jackson to the President, dated Nashville, Jan. 6, 1818, in which, after acknowledging the receipt of orders and enclosures, and making remarks on them, he wrote, near the close of the letter: "The order to take possession of Amelia Island ought to be carried into execution at all hazards, and simultaneously the whole of Florida seized. . . . This can be done without implicating the government. Let it be signified to me through any channel, (say Mr. J. Rhea,) that the possession of the Floridas would be desirable to the United States, and in sixty days it will be accomplished." This letter was received by Mr. Monroe, when he was prostrated by sickness. He read a few lines of it only, and then, Mr. Calhoun being present, he handed it to him

for his perusal. Mr. Calhoun read it, and returned it to the President, remarking that it was a confidential letter relating to Florida, which he must answer. Mr. Monroe, on being inquired of for the letter, the next December, had forgotten it entirely, but on searching found it among his papers, and then read it, as he avers, for the first time.

Nevertheless, General Jackson asserts, that on his way to take command of the troops, he received, "at Big Creek, four miles in advance of Hartford, Georgia," a letter from Mr. Rhea, stating that "the President had shown him the confidential letter, and requested him to state that he approved of his suggestions." And he further states, that on the 13th of May, Mr. Calhoun wrote to Governor Bibb, as before mentioned, that "General Jackson is vested with full power to conduct the war in the manner he may deem best;" that he distinctly informed Mr. Calhoun, in March and in May, of his intention to seize and occupy St. Marks and Pensacola, and, afterwards, that he had done so; and that, not until he received a private letter from the President, dated July 19th, had he any doubt that he had acted, in every respect, in strict accordance with the views of the President and Secretary.

General Jackson further states, that, in the winter of 1818-19, at Washington, "Mr. Rhea called on him, as he said, at the request of Mr. Monroe, and begged him, on his return home, to burn his reply. He said that the President feared that, by the death of General Jackson, or some other accident, it might fall into the hands of those who would make an improper use of it. He therefore conjured him, by the friendship which had always existed between them, (and by his obligations as a brother mason,) to destroy it on his return to Nashville. Believing Mr. Monroe and Mr. Calhoun to be his devoted friends, and not deeming it *possible* that any incident could occur which would require or justify its use, he gave Mr. Rhea the promise he solicited, and accordingly, after his return to Nashville, he burned Mr. Rhea's letter, and on his letter book, opposite the copy of his confidential letter to Mr. Monroe, made this entry: '*Mr. Rhea's letter in answer is burnt this 12th April, 1819.*'"

It seems to be well established, by the vouchers referred to, in Mr. Benton's introductory remarks, as sustaining the text, in every particular, that General Jackson received the letter from Mr. Rhea; but men will doubt whether Mr.

Monroe instructed him to write it, and will inquire who did. That such a letter was written, and such an answer received, was doubtless known to the members of the Cabinet before the commencement of the debate in the House of Representatives. A full account of the interview which took place, at New York, between Mr. Monroe and Mr. Rhea, when the former was on his death-bed, may furnish aid in forming an opinion on the subject.

In the year 1818, Col. Benton, then a member of the bar in Missouri, having learned that in the treaty just concluded between the United States and Spain, establishing the boundaries between the two nations, Texas was not relinquished to us, appealed to the people through the newspapers against what he called the *cession* of that country to Spain, warmly censuring Mr. Adams, then Secretary of State, of whose "great culpability" he now says he then had no doubt, for thus consenting to diminish the area of Southern territory. Knowing now that Mr. Adams did not vote, in the Cabinet, to relinquish our *claim* to Texas, he charges the other members of the Cabinet (Monroe, Crawford and Calhoun) with having so voted, from an apprehension that insisting on it at that time, when slavery agitation was rife, would endanger their success as candidates for the presidency. This, he says, is the inside view of the slave question, as it stood at that time, whereof he has "the material to write the true and secret history; but this belongs to the chapter of 1844," in the forthcoming volume. A promise to disclose the secret history and causes of past transactions, is apt to stimulate curiosity; but we doubt whether the facts which he may be able to reveal will be sufficient to sustain his charge, unless he should show also that our claim to Texas was valid beyond question.

In the nineteenth chapter, an account is given of the election of President, by the House of Representatives, when Adams, Jackson, and Crawford were candidates. The author furnishes additional evidence of the falsity of the charge of bargain between Adams and Clay. "It came within my knowledge, (for I was then intimate with Mr. Clay,) long before the election, and probably before Mr. Adams knew it himself, that Mr. Clay intended to support him against General Jackson; and for the reasons after-

wards averred in his public speeches." He also observes, that "the election of Mr. Adams was perfectly constitutional, and as such fully submitted to by the people ; but it was also in violation of the *demos krateo* (democratic) principle, and that violation was signally rebuked." In saying that the election was a violation of the democratic principle, we think he is mistaken. If our memory is not greatly at fault, it was shown at the time that, though General Jackson received the greatest number of electoral votes, Mr. Adams received the greatest number of the votes of the people. It was, in fact, an instance in which the democratic principle prevailed over an aristocratic feature of the Constitution.

Elsewhere, in speaking of the succeeding election he says that the democratic principle was then victor, 'and great and good were the results that ensued.' If he means, as he apparently does, that the results have been better than would have been the results of a different event, we ask, with great deference, from what source does he derive the power to compare the actual results of an actual event with the results of an event that never happened? Had Mr. Adams been re-elected, — he who never removed an officer but for misconduct ; of whom it may with truth be said that, in the performance of his official duties, he knew no North, no South, no East, no West ; who missed a prolonged opportunity to do good to his country, by an earnest pursuit of an honest and enduring fame ; who, when alive, was ridiculed by his enemies and censured by many friends for rejecting with disdain the expedients of ambitious politicians, but when death struck him at his post was spontaneously lauded, as no one before has been but he who still holds the first place in our hearts — had he been re-elected, is Mr. Benton certain that the constitution would have been administered with less regard to its provisions ; that the will of the people would have been left less un-biased and been less regarded ; that intriguers would have flourished more in the land ; that the national character would have been less respected ; and, in fine, that the people would have been less prosperous, and have had less cause to be contented ?

The project of removing the Indians who still remained in the interior of the south-western States, from the east to the west side of the Mississippi, though before sug-

gested, was first undertaken in 1824, under the auspices of President Monroe and Mr. Calhoun. On the 12th of February, 1825, a treaty was made with the celebrated Creek chief McIntosh, and others, by which all the lands belonging to that nation, in Georgia, were ceded to her, and the Indians were bound to seek a new home in the wilderness beyond Arkansas. Several chiefs, who followed this treaty to Washington, protested against the ratification of it on the ground that McIntosh had no authority to sign it. The protest was but little regarded, and the session of Congress being near its close it was immediately ratified. Very soon afterwards, McIntosh was put to death, in pursuance of a law of the Creek nation. Mr. Adams, who had then just entered on the duties of his office of President, being convinced, on investigation, that the treaty was signed without authority, determined not to enforce it. All Georgia was enraged, and her Governor declared he would enforce it himself, take possession of the lands, and drive off the Indians. This aroused the President, who displayed traits of character for which Gen. Jackson had become famous. He immediately despatched Gen. Gaines into the Indian territory with a large force to resist any attempts which Georgia might make to execute her threats, and wrote a stern letter to the Governor, declaring explicitly that he felt bound, by even a higher obligation than that imposed by the constitution, to protect the Indians. At the same time, he opened a negotiation with the acknowledged and accredited chiefs of the Creek nation; and subsequently a new treaty was concluded and ratified, by which, for a larger compensation, differently distributed, the nation sold all their lands and agreed to emigrate as was stipulated in the void treaty.

This, adds Mr. Benton, was an incalculable advantage to Georgia, "and had been sought in vain under three successive southern Presidents, — Jefferson, Madison, Monroe — and was now accomplished under a northern president, with the full concurrence and support of the northern delegations in Congress: for the northern representatives in the House voted the appropriations to carry the treaty into effect as readily as the senators had voted the ratification of the treaty itself. Candid men, friendly to the harmony and stability of this Union, should remember these things when they hear the northern States, on account of the conduct of some societies and individuals,

charged with unjust and criminal designs towards the South."

Mr. Benton is in favor of an amendment of the Constitution of the United States, giving to the people the election of President and Vice President, by a direct vote for the men of their choice. To effect his object, he would provide that each State should be divided into as many districts as it may have senators and representatives, and that the majority in each district should be entitled to one vote. If no choice should be made at the first meeting, another meeting should be held, and a choice made from the two candidates having the highest number of votes. He proposed such an amendment in 1824, and again as Chairman of a committee in 1825; and President Jackson recommended it to the consideration of Congress in 1829.

The reasons he assigns for his proposed amendment are well worthy of consideration, and we will briefly state the most important:—The intent of the framers of the Constitution, in interposing electors between the people and the candidates,—that eminent and intelligent citizens should be designated to supply the inevitable want of knowledge among the people—has been entirely disregarded and defeated; they exercise no will of their own, but are the mere instruments of the conventions that designate them, as well when it does not express their own preferences or the will of the people, as when it does,—disobedience to their injunction being punishable with every penalty which public indignation could inflict; in the conventions held to nominate presidential candidates, the selection becomes the result of a juggle, conducted by a few adroit managers, who baffle the nomination until they are able to govern it and to substitute their own will for that of the people; "perhaps another example is not upon earth of a free people voluntarily relinquishing the elective franchise in a case so great as that of electing their own chief magistrate, and becoming the passive followers of an irresponsible body—juggled, and baffled, and governed by a few dexterous contrivers, always looking to their own interests in the game which they play;" should the amendment be adopted, if no one receives a majority at the first meeting, the vote given will stand as a popular nomination of the two persons having the highest number of votes, and one of the two would certainly be elected on the second trial.

The choice of electors by a general ticket, the mode now almost universally adopted, is considered and condemned. It does not give fair play to the will of the people, nor to that of different portions of the people. It violates the rights of minorities, for a majority of one will carry the vote of a whole State, which may consist of twenty or thirty electoral votes; and this majority may be given in one part of a State, and the minority in another, each part having distinct and opposite interests. The minority does not merely lose their votes; they are taken away, and given in effect to men whom they voted against. And, furthermore, it gives undue consequence to one or a few leaders and managers of elections, who may found greater claims to office on thirty votes than on one.

We are inclined to think that the constitution, thus amended, would be better than it now is. But will it abolish conventions, the greatest evil that has arisen from the working of the constitution? Will it arrest the movement of that newly invented machinery which transforms freemen into puppets and automatons? Will not party conventions continue to control, as before, the votes of all party men in the districts? Will not itinerant intriguers volunteer or be sent? And what would a voter in Tennessee or California know of a candidate in New York or Maine? Unless the amendment, by an additional clause, should provide that candidates nominated by conventions should be ineligible, it would not destroy their influence, nor smother party spirit, so effectually as the amendment proposed by Mr. Hillhouse, providing for the appointment of president by lot; of which we gave an account, and some of the many reasons in support of it, in a recent number of this Journal.

Hope and perseverance are characteristics of Mr. Benton. Though he failed in Congress, he does not despair that the great evil, and flagrant disgrace, of caucus nominations will be removed in time. And he now republishes his proposition and some extracts from his speech, "in the hope of keeping the question alive, and obtaining for it a better success at some future day." Select bodies are not, he says, the places for popular reforms. They are for the benefit of the people, and should begin with the people. State legislatures are authorized to propose amendments, and the members of those bodies should be specially instructed by their constituents. The greatest reform ever

effected by peaceful means, was the parliamentary reform of Great Britain, which was not effected until after forty years of continued exertion, and by incessant appeals to the people themselves. Its friends began their efforts in 1792, and succeeded in 1832; and in their success is matter for encouragement, as in their conduct there is an example for imitation.

Our extracts, from the work before us, have not been given to exhibit samples of the author's style, but to elucidate historical events, or to make known his opinions. We will now copy a portion of the account he has given, and the character he has drawn, of William Pinkney, not so much, however, to present a favorable specimen of his style as to gratify our professional readers:

"He fell like the warrior in the plenitude of his strength, and on the field of his fame — under the double labors of the Supreme Court and of the Senate, and under the immense concentration of thought which he gave to the preparation of his speeches. He was considered, in his day, the first of American orators, but will hardly keep that place with posterity, because he spoke more to the hearer than to the reader — to the present than to the absent — and avoided the careful publication of his own speeches. He labored them hard, but it was for the effect of their delivery, and the triumph of present victory. He loved the admiration of the crowded gallery — the trumpet tongued fame which went forth from the forum — the victory which crowned the effort; but avoided the publication of what was received with so much applause, giving as a reason that the published speech would not sustain the renown of the delivered one. His *forte* as a speaker lay in his judgment, his logic, his power of argument; but like many other men of acknowledged pre-eminence in some great gift of nature, and who are still ambitious of some inferior gift, he courted his imagination too much, and laid too much stress on action and delivery; so potent on the small circle of actual hearers, but so lost on the national audience which the press now gives to a great speaker. In other respects, Mr. Pinkney was truly a great orator, rich in his material, strong in his argument — clear, natural, and regular in the exposition of his subject, comprehensive in his views, and chaste in his diction. His speeches, both senatorial and forensic were fully

studied and elaborately prepared—all the argumentative parts carefully digested under appropriate heads, and the showy passages often fully written out and committed to memory. He would not speak at all except upon preparation; and at sexagenarian age—that at which I knew him—was a model of study and labor to all young men. His last speech in the Senate was in reply to Mr. Rufus King, on the Missouri question, and was the master effort of his life. The subject, the place, the audience, the antagonist, were all such as to excite him to the utmost exertion. The subject was a national controversy, convulsing the Union and menacing it with dissolution; the place was the American Senate; the audience was Europe and America; the antagonist was *PRINCEPS SENATUS*, illustrious for thirty years of diplomatic and senatorial service, and for great dignity of life and character. He had ample time for preparation, and availed himself of it. Mr. King had spoken the session before, and published the 'Substance' of his speeches, (for there were two of them,) after the adjournment of Congress. They were the signal guns for the Missouri Controversy.* It was to these published speeches that Mr. Pinkney replied, and with the interval between two sessions to prepare. It was a dazzling and over-powering reply, with the prestige of having the Union and the harmony of the States for its object, and crowded with rich material. The most brilliant part of it was a highly wrought and splendid amplification, (with illustrations from Greek and Roman history,) of that passage in Mr. Burke's speech upon 'Conciliation with the Colonies,' in which, and in looking to the elements of American resistance to British power, he looks to the spirit of the slave-holding colonies as a main ingredient, and attributes to the masters of slaves, who are not themselves slaves, the highest love of liberty and the most difficult task of subjection. It was the most gorgeous speech ever delivered in the Senate, and the most applauded; but it was only a magnificent exhibition, as Mr. Pinkney knew, and could not sustain, in the reading, the plaudits it received in delivery; and therefore he avoided its publication."

* Mr. Benton, when he wrote this, must have forgotten the stormy debate, in the House of Representatives, which preceded the debate in the Senate. Extracts from two eloquent and forcible speeches there delivered may be read in Hildreth's History.

We must here take leave, for the present at least, of the ponderous volume which Col. Benton has presented to his fellow citizens ; but we ought not to do so without expressing our approbation of the plan and execution of the work. We do not assent to all his opinions, nor pretend to know the verity of his facts, but we declare our belief that they are entitled to that regard from the public, and the future historian, which is due to any eminent partizan statesman. We hope that his example will be followed by other statesmen, of every party, so that posterity may know what measures have been carried, and what defeated, at any and every period of our national existence, and learn all that can be told of the motives and reasons which led to their adoption or rejection. Let no one be deterred by dread of the imputation of egotism or vanity ; he is not worthy to be ranked among statesmen who is not superior to the influence of such fear.

A SHORT READING ON A SHORT CLAUSE IN THE CONSTITUTION OF THE UNITED STATES.*

"No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any laws or regulations therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due."

Art. 4, sect. 2, clause 3.

It is a rule of construction, universally admitted, that Congress cannot pass any act, which can have the force of law, unless the power to pass such a law is granted in the Constitution. This clause certainly grants no such power. What then is its force and intent ?

It has the force of *law*, of fundamental, "supreme" law. (Art. 6.) Like all law, it is a rule of action to individuals, and courts are bound to regard it. Assuming that the word "persons" includes *slaves*, no grant of power to Congress was or is needed. As law, it executes itself, or may be executed without any other law, State or national, on the

* These views of the legal aspect of this "vexed question" may be in part novel and interesting to some of our readers. We give no opinion in regard to them. — Ed.

subject, and without the instrumentality of any officers *specially* appointed, or *specially* authorized to execute it.

The chief, perhaps the whole intent of the clause is to repeal, or render inoperative, all State laws and regulations interfering with the recovery of escaping slaves. It gives or secures to the owner of a slave, residing in a slave State, the same right to take or recover him, and by the same mode, should he escape into a free State, as he would have should the slave run away from his plantation to the plantation of a fellow-citizen of the same slave State. It authorizes the master, if he should find the slave in a free State, in the highway or elsewhere, not in the possession or under the protection of any one, to seize him and take him home, if he can. If he ascertains that he is in the possession of any one, or is harbored by any one, he may demand him of such person, who must, in obedience to the laws, "deliver him up" to the claimant.

And if the person on whom the demand is made should refuse to "deliver him up," the claimant may institute against him an appropriate action — such action as is in use for such purpose in slave States, detinue for instance, and thus vindicate his right, under the law, to have his slave "delivered up." This action, and probably also trover and replevin, are now in use in the Southern States, and may or must have been, when the convention was sitting, in use in all the States where slavery then existed, to recover the possession of slaves or their value. The action may be tried in the same courts and in the same way that any such action may be tried. The question to be submitted to, and tried by the jury would be — (besides those of possession, demand and refusal) — Was the "person" held to service or labor by the laws of the State from which he fled? Did he *escape* from that State? Was such service or labor due to the claimant? If on all these questions submitted, the verdict of the jury should be in the affirmative, the decision of the court would necessarily be, that the slave should "be delivered up" to the claimant, or his value paid.

If the clause is supposed, by any portion of the people, to be defective, or if, by any other portion, it is considered objectionable, it may be amended or repealed, as any other provision of the Constitution may be, but not otherwise. The national legislature can do nothing; the State legislatures are not bound, except by comity to sister States,

to do anything ; but they may do, in aid of the fundamental law, anything which their own constitutions do not forbid ; and they may do anything for the protection of their own citizens, not in derogation of the fundamental or "supreme" law.

The foregoing construction of the clause quoted is confirmed by a comparison, or contrast, of its phraseology with that of the clause preceding it, which relates to the rendition of fugitives from justice. In that clause, any and all implication of an action or suit is excluded ; its special and obvious purpose is to authorize and prescribe the necessary *process* to bring on a trial, in a criminal prosecution already commenced, in another State. The change of phraseology is significant. x.

Recent American Decisions.

Circuit Court of the United States, for the District of Vermont, October Term, 1853.

HENRY HUBBARD AND SOLOMON DOWNER, Adm. of SILAS F. BELKNAP *v.* THE NORTHERN RAILROAD COMPANY.

SAME *v.* SAME AND TRUSTEES.

Where there were joint plaintiffs, one a citizen of Vermont, the other of New Hampshire, in an action in a State Court of Vermont against a Corporation created, established and performing its corporate functions in New York, it was *held*, that the action could not be removed into the Circuit Court of the United States for the District of Vermont on motion of the defendant under the Act of Congress of Sept. 24, 1789; but to give jurisdiction to that court on such removal, both plaintiffs must be citizens of Vermont.

THESE actions, being actions at law, were originally instituted in the State court, and were removed from that court to this court on motion of the defendant, under the Act of Congress of September 24th, 1789. The actions having been entered in this court, pursuant to the order of removal from the State court, the plaintiffs appeared and filed their motions to dismiss the actions, and remand them to the State court, for want of jurisdiction in this court.

J. Converse, for plaintiff.

S. S. Phelps, and *L. B. Peck*, for defendant.

PRENTISS, J. — The judicial power of the United States, by the Constitution, is vested in our Supreme Court, and in such inferior courts as the Congress may, from time to time, ordain and establish. And here I cannot forbear saying, what is very naturally suggested to the mind by this reference to the Constitution, though it may have no direct or immediate bearing upon the particular matter in question, that the more closely any one studies the Constitution of the United States, and the greater his experience and opportunities of observation in civil life, the more he will be brought to admire the wisdom, the sagacity, and the enlightened patriotism of the authors of that instrument. None of its provisions present higher evidence of intelligence, judgment, and inflexible devotion to principle, than those concerning the judiciary — giving it, as they do, a limited, yet adequate jurisdiction, extending to, but not going a jot beyond, what the wants, necessities, and exigencies of the government of a nation, formed by a union of States retaining in severalty a distinct but qualified sovereignty, require — with a tenure of office during good behavior, determinable only by misconduct, — thus securing, as far as any organic law can do, consistently with subjection to just responsibility, that independence of opinion and action, which is indispensably requisite to preserve rectitude, impartiality, and firmness in the administration of justice.

Under and pursuant to the Constitution, Congress, besides a Supreme Court, has established certain courts inferior to that court, called and known as the Circuit and District Courts. In erecting these courts, Congress might have given them such jurisdiction as it thought proper, keeping within the limits prescribed by the Constitution. It might have vested in the Circuit Court, for instance, more or less of the judicial power of the United States, not by the Constitution vested originally or exclusively in the Supreme Court. It has given it, not all it might have given it under the Constitution, but a limited and restricted jurisdiction. By the Constitution, the judicial power of the United States extends, for example, in general terms, to "controversies between citizens of different States;" but by the act of Congress the Circuit Court cannot take jurisdiction of all such controversies, but only of such where the matter in dispute exceeds the sum or value of five hundred dollars. So, as we shall find, the jurisdiction is subject to

restrictions in other respects, such, for instance, as residence of one of the parties in the district where the suit is brought. The result therefore is, that this court has no jurisdiction, and of course cannot exercise any, but such as Congress, by legislative acts warranted by the Constitution, has conferred upon it.

The plaintiffs are joint administrators, under letters of administration granted by a court of probate in this State, the intestate having had his domicile here. One of the plaintiffs, Hubbard, is a citizen of New Hampshire, and the other, Downer, a citizen of this State. The defendant is a corporation, created, established, and performing its corporate functions in New York. The suits were regularly commenced in the State court, according to the laws of the State, service being made upon the defendant in one case, by attaching a large amount of personal property, and in the other, by attaching personal property and also certain debts due to the defendant from certain persons summoned in as trustees.

The language used by Congress in providing for, and regulating the removal of causes, at the instance of the defendant, from a State court, is not the same, in reference to the character or residence of the parties, as that employed in relation to suits originally brought to the Circuit Court. There is a marked difference, in the particular mentioned in the phraseology of the two provisions,—one being much more restrictive than the other. In that giving original jurisdiction, the words are, “where the suit is *between* a citizen of the State where the suit is brought, and a citizen of another State;” in that giving jurisdiction of suits originally commenced in a State court, and regulating their removal, the words are, “commenced by a citizen of the State in which the suit is brought against a citizen of another State.” Of course, jurisdiction, which is excluded in both classes of cases where neither party is a citizen of the State in which the suit is brought, is not coextensive in the latter class with that in the former; for no suit, for instance, commenced in a State court, by a citizen of another State against a citizen of the State where the suit is brought, can be removed to the Circuit Court, although it might have been originally brought there. But the difference between the two provisions, so far as concerns the single isolated question here presented, is not material, the construction in that particular, as will be seen, being alike as to both.

If Downer were the sole plaintiff in these actions, he being a citizen of this State, and the defendant resident in New York, the cases, it is obvious, would be within the very terms of the act of Congress; but if Hubbard were the sole plaintiff, he not being a citizen of this State, the cases, it is equally obvious, would not be within the act. The question, therefore, simply is, whether, there being two plaintiffs, it is sufficient to bring the cases within the provisions of the act of Congress, and give jurisdiction, that one of the plaintiffs is a citizen of this State, or whether it is necessary that both should be.

Though there may be no adjudged case exactly in point, or, in other words, any express adjudication in point upon this particular provision of the act, there are several cases upon the provision relating to original jurisdiction, which, from just analogy, would seem to decide the present question. In the case of the *Corporation of New Orleans v. Winter et al.*, in error, 1 Wheat. 91, where the plaintiffs below brought their suit in the Circuit Court of Louisiana, one of them being a citizen of the State of Kentucky, and the other a citizen of the Mississippi Territory, it was held, that a citizen of a Territory cannot sue a citizen of a State in the Courts of the United States, nor can those courts take jurisdiction by other parties being joined who are capable of suing. MARSHALL, Ch. J., after stating that Winter, being a citizen of the Mississippi Territory, was incapable of maintaining a suit alone in the Circuit Court of Louisiana, asks, "Is his case mended by being associated with others who are capable of suing in that court?" And he decides the question by saying — "In the case of *Strawbridge et al. v. Curtis et al.*, 3 Cranch, 267, it was decided, that where a joint interest is prosecuted, the jurisdiction cannot be sustained, unless each individual be entitled to claim that jurisdiction." The sum of the matter seems to be, that in every case brought before a Circuit Court by original process, each of the persons prosecuting must be competent to sue, and each of the persons defending liable to be sued, in such court. Here, one of the plaintiffs, as well as the defendant, residing out of this district, it is quite evident that the cases between these parties, though between citizens of different States, were not of a character to be within the original cognizance of this court, and of course could not have been instituted therein.

From the rule so laid down at an early day, and thus

reconsidered and reaffirmed at an after period, in respect to the jurisdiction of suits originally brought to the Circuit Court, it must follow, unless a distinction be made where there is no perceptible ground of difference, that the jurisdiction cannot be sustained in the case of a suit originally commenced in and removed from a State court, except the citizenship of each individual be such as to make the suit removable, and thus subject him to such jurisdiction. According to the rule, the local residence of all the parties on each side must be such as to bring the case within the provision of the act of Congress regulating the removal; that is, all the party plaintiffs must be citizens of the State in which the suit is brought, and all the party defendants citizens of some other State or States.

Such appearing to be the construction not only authorized, but called for, by determinations of the highest judicial authority, it forms the law for the decision of the question here pending; and according to it, one of the plaintiffs not being a citizen of this State, this court has not jurisdiction. The consequence is, that the motions to dismiss must be allowed, and the causes remanded to the State court.

NOTE.—It was clearly seen by the great men who conceived and framed the Constitution of the United States, that without a national judiciary, existing under and deriving its authority solely from the national government, with powers commensurate with, but not exceeding the great purposes and objects of the Union, the government would have neither efficiency nor stability, and would soon perish for want of power in itself to enforce obedience to its laws, and hold the people, and through them the States, in just subordination to the paramount national authority. It was considered indispensable to have a judiciary, to take cognizance not only of all suits and prosecutions in behalf of the general government, or arising under its laws, but of controversies between citizens of different States, and especially of all controversies between States, arising out of adverse or interfering State claims, thereby securing a peaceful determination of what might otherwise grow into forcible collisions and conflicts; and also for protection to every citizen of the Union against all unconstitutional invasions of his rights, either by acts of legislation prohibited to the States, or by unauthorized legislative action of the general government.

It was also held, and acted upon as an undeniable proposition, that, to maintain the Constitution itself in its true spirit and meaning, and secure a just and faithful performance of judicial duty, in all questions arising under the constitution and laws, or affecting individual private rights, it was not only expedient and judicious, but essentially necessary, to make the judiciary *independent*—independent as provided in the Constitution—by elevating the judges, as far as practicable, above and beyond the reach of governmental, popular, or sinister influences. It was seen, that if you make the continuance in office of a judge dependent on re-appointment or re-

election, at short stated periods, you so much lessen or impair his independence: and that just in proportion as you do that, you diminish your security for his good behavior. At the same time it was seen, what more than sixty years experience has proved to be true, that, as the judges neither would have, nor could exercise, any power otherwise than through the decision of controversies brought judicially before them, between party and party, there could be no danger whatever, either to the States or the people, from such independence of position and consequent independence of opinion and action.

The principle of judicial independence, and the reasons on which it is founded, apply, in their utmost force, to all free representative governments. If in favorable times, and under peculiarly favorable circumstances, a dependent judiciary may be both able and upright, as in Vermont for instance, many years much to her credit, as well as advantage, it raises no doubt as to the superior wisdom and safety of a more permanent tenure of office. The instance mentioned is at the most but an exception, and is owing chiefly to the steady, uniform political character of the State, to the habit prevailing in it of never allowing the judicial appointments to be controlled by party politics, and to the commercial pursuits and interests of the people being of such limited extent as to make the suits in its courts in general of comparatively small magnitude. But there, as everywhere else, it would be both wiser and safer to have the independence of the judiciary such as to place it, not only beyond the reach, so long as its ministers conduct themselves with integrity, of either of the other powers of government, but also beyond the possible reach of popular and personal influences.

In general, notwithstanding all the formal guarantees of a written constitution, if the judge be not thus independent, what assurance or confidence can the citizen have of impartial justice, or of certain and effectual protection from unjust and unconstitutional violation of his rights? If the liberty of speech, or of the press, be assailed; if the writ of *habeas corpus* be suspended in time of peace; if the trial by jury be invaded; if the obligation of contracts be impaired, or vested rights infringed; if the citizen be deprived of his liberty, or of his property, or if his life be unconstitutionally put in jeopardy; where is the remedy, or who is to stay the hand of oppression? The only remedy is in the courts of justice; and without an independent judiciary—independent in the proper sense—it would be hopeless to think of maintaining the provisions of the Constitution for the security of these and other private rights, in their full vigor and efficacy, according to their true legitimate meaning, or of their having any settled, fixed, and uniform operation. Indeed, with a dependent, or in other words, a time-serving and temporizing judiciary, the Constitution would either cease to be the supreme paramount law, or, what would be the same in effect, would be made to mean, in all parts most essential to the security of the citizen, just what the legislative power, or popular opinion for the time being, might be disposed to have it.

*District Court of the United States for the District of
Massachusetts, July 31st, 1854.*

THE ABBY WHITMAN.

C. F. GARDINER, *et al.*, Libellants ; J. H. PEARSON, *et al.*, and
GEO. CANNON, Assignee, Claimants.

*Shipping—Lien of Material Men—Circumstances showing an Intention to
waive a Lien and to rely on a personal Credit—Pleading.*

THIS was a libel against the Abby Whitman, for materials alleged to have been used in her construction, under the Massachusetts Statute, entitled an "Act establishing a lien upon ships and vessels in certain cases," Stat. 1848, c. 290. The claimants contending that under the circumstances of the case no lien existed, even if the materials were so used, a hearing was had to determine this point. The claimants contended that the vessel was built by A. B. for other persons, under a contract with them, by which payments were to be made during her construction, one when she was framed, and the balance on her completion. That the whole amount due by the contract was paid by them to B., on delivery of the vessel, without notice of the libellant's claim, and that the vessel under these circumstances became, at least on the payment made when she was framed, the property of the persons for whom she was built, on the authority of *Clark v. Spence*, 4 Ad. & El. 448, and other cases ; and that if so, or even if there was no such change in the property of the vessel, still there was no lien, under the case of *Smith v. The Eastern Railroad*, 1 Curtis, 253. They also claimed that the materials in question were supplied on the exclusive personal credit of the builder, and that therefore no lien arose ; that there was a credit given by the libellants to him for four months, except as to one item, which was claimed to have been paid, and that a credit for such time showed an intention not to rely upon the lien, as it might extend beyond the period to which the lien was limited by the statute ; and further, that by applying certain payments acknowledged to have been made by the builder, and receipted for on account, in the order of the debts, and allowing the four months credit claimed, nothing would be due at the date of the libel.

The same builder was constructing other vessels, at or

about the same time, in the same yard, and materials furnished by the libellants were employed in such other vessels.

SPRAGUE, J., said that so far as the question of property in the vessel was concerned, she was, and remained, until completion and delivery to the purchaser, the property of the builder; that one material element upon which the English decisions rested, he thought, was wanting here, viz: the fixing any payment or payments at a specific period in her construction; but if that were otherwise, still the authority of those cases had not been recognized, and the law would probably be otherwise held here; and that this case did not come within that of *The Eastern Railroad*.

As to the lien claimed on the vessel, however, he was of opinion that it did not exist, because the evidence and circumstances in the case showed an intention on the part of the libellants to rely upon the personal credit of the builder and not upon the vessel. This appeared in the first place from the libellants' own books, in which all the charges were made against the builder personally, without any reference to, or mention of any of the vessels which he was building; again, the materials appeared to have been taken from the libellants' yard by a teamster employed by the builder, and transferred to his ship-yard, while no exertions appeared to have been made by them to ascertain for what purpose these materials were to be used, as would naturally have been the case if they intended to claim a lien upon the vessels in whose construction they were employed, the right to a lien depending upon their being actually used in the construction of some vessel; and if they looked to any vessel, they ought to have known in which their materials were used, or to which they were hauled, and would naturally have made inquiries at the time; but no inquiries were made, so far as appeared, and no charge to any vessel.

Thirdly, when payments were made by B., the builder, as they were from time to time, to the amount of \$2500, there was no appropriation by the libellants on their books, or receipts, to any items to distinguish their claim upon the different vessels, as would be proper, if they intended to claim liens upon them, for it would be material to know which was paid for, and which not.

The fourth circumstance bearing upon this matter was

the alleged credit of four months. In itself, that was the most material, but it was mentioned last because there was more doubt as to the fact.

His Honor reviewed the evidence upon this point, and expressed his opinion that it showed a course of conduct by the libellants, inconsistent with the intention to claim a lien, even if it did not, and he seemed to consider that the weight of the testimony was that it did, show such a credit. He was of opinion that the payments made must be applied to the account generally, and not as the plaintiff had claimed and offered evidence to show that they should be, to other items than those specified in his libel. And he came to the conclusion, upon the whole, that no lien existed, because upon all the evidence, not relying upon any of the considerations mentioned, alone, it appeared to be the libellants' intention to waive it, and rely upon the builder personally.

The matter of the four months' credit he had considered only as bearing upon the general question of a personal credit, because it was not alleged in the claimants' answers as a substantive ground of defence, although conclusive, when properly alleged and proved, if that credit would certainly extend beyond the time limited by statute, and more or less strong in proportion to the probability that it would extend beyond that time, the weight to be given to it in this case, depending on its force as evidence of an intention not to rely upon a lien. Libel dismissed, with costs for claimants.

Henry F. Durant, and *Benjamin Pond*, for the libellants; *C. B. Goodrich*, for Pearson and others; *Geo. S. Hale*, for Cannon.

THE GENERAL JACKSON. — *August, 1854.*

ISAAC BASS, *Libellant*; S. C. HUNT, *Claimant*.

Shipping — Lien for Supplies — Waiver by delay to enforce.

THIS was a libel for supplies furnished to the schooner General Jackson while in the port of Boston at various times, while the vessel was owned by residents and citizens of Maine. The last item in the libellant's account

was for articles furnished Septemberth 24, 1852. It was agreed that the vessel was purchased by the claimant in May, 1854, of her former owners, in ignorance of the present claim; that said claim had been assigned by the libellant as collateral security for a debt, which debt had been paid, and that the claim now belonged to the libellant.

It was contended by the claimant, 1st, that the libellant after a delay of nearly two years could not enforce this lien against a *bonâ fide* purchaser, without notice; and 2d, that the assignment of the claim operated as a waiver of the lien.

SPRAGUE, J. — In regard to the first point the rule is, that the lien shall be enforced within a reasonable time, and what constitutes a reasonable time depends upon the circumstances of each case. It is generally held, that a lien of this character should be enforced as soon as the expiration of the first voyage after supplies or materials furnished, and it is only under peculiar circumstances that the lien is extended beyond such time. These liens are created for the benefit of commerce. Foreign vessels being in ports without their owners or any responsible parties connected with them, often require repairs and supplies. To enable the master to obtain these this extraordinary lien is given. It is founded in the necessities of commerce. But it is to be remembered that these liens are secret, and there is no place where other parties may inquire and learn their existence or extent. Therefore it is fit and proper that they should be promptly enforced and extinguished.

To apply these principles to the present case, it appears that the last item of supplies furnished this vessel was in 1852, about eighteen months before the filing of the libel, and during all that period the vessel was plying between this port and the ports of Maine, as often as once a month, giving the libellant ample opportunity to enforce his claim, had he seen fit, long before the sale of the vessel to the present claimant. It must therefore be held that the libellant has waived his lien.

As to the second point, the assignment of the claim as security for a debt which had since been paid, would not of itself be a waiver of the lien.

Libel dismissed, with costs for the claimant.

Benjamin Pond, for libellant.

H. C. Hutchins, for claimant.

*Supreme Judicial Court of Massachusetts, Suffolk, ss.
March Term, 1854.*

NORWAY PLAINS COMPANY vs. BOSTON AND MAINE RAILROAD.¹

Common Carriers — Determination of liability — Notice to Consignee.

Proprietors of a railroad, who transport goods over their road for hire, and deposit them in their warehouse without additional charge, until the owner or consignee has a reasonable time to take them away, are not liable, as common carriers, for the loss of the goods by fire, without negligence or default on their part, after the goods are unladen from the cars and placed in the warehouse; but are liable as warehousemen, only for want of ordinary care; although the owner or consignee has no opportunity to take the goods away before the fire.

It seems, that the proprietors of a railroad are not obliged to give notice to the consignee of the arrival of the goods, transported by them, in order to exonerate themselves from their liability as common carriers.

ACTION of contract upon the agreement of the defendants to transport certain goods from Rochester (N. H.) to Boston.

The parties submitted the case to the decision of the court upon the following statement of facts: "The defendants received of the plaintiffs at Rochester packages and bales of merchandise, to be transported to Boston. Receipts specifying the date of the delivery of the goods to the defendants, and containing a description of them, were signed by the agent of the corporation, copies of which are annexed." These receipts, the form of which is printed, are respectively dated October 31st, and November 2d, 1850, and the defendants thereby acknowledge that they have received the goods "numbered and marked as above, which the company promises to forward by its railroad, and deliver to — or order at its depot in Boston; freight therefor to be paid."

The train, in which the goods mentioned in the receipt dated November 2d, 1850, were sent, usually arrives in Boston at about half past twelve o'clock; but on the day of its arrival, November 4th, 1850, did not reach the depot until a later time. Ames, the truckman employed by the plaintiffs to take their freight from the defendants' depot in Boston, and whose principal business it is to cart goods from said depot for the plaintiffs and others, went for the goods, and waited from about two o'clock until about three and half o'clock, in the afternoon, and was then told by the agents of the defendants that they

¹ 1 Gray, 263.

were in the hindmost car, which was then out on the wharf and inaccessible to trucks or carts, and could not then be delivered; and no time was stated when they might be expected to be delivered; and he, being satisfied that they could not be reached until it would be too late to transport and deposit them where they were to go that day, and no notice being given when they would be delivered, departed, intending to call for them early the next morning. In order that the goods should be transported to the place where the truckman was to carry them, it was necessary to receive them by three and a half or four o'clock, the days being short, and the stores being closed about sunset. During the ensuing night, or the morning of November 5th, 1850, before daylight, the depot, with the packages and bales of merchandise belonging to the plaintiffs, was consumed by fire.

"When a freight train arrives, it is usual to run it into the depot as far as possible and unlade the cars which are inside, and relade them with the outward freight, and then run them off on to another track; so that those outside are detained there until those inside are unladen, are reladed and passed forward; and this was the course pursued at this time, and caused corresponding delay in the delivery of the goods in the hindmost cars: and this was a reasonable course.

"Said Ames had authority from the plaintiff to take from said depot any goods arriving there without special directions or notice, and was in the frequent habit of so doing, and therefore was allowed by the railroad, on the arrival of the train, to inspect the way bill, to inform himself what goods were on board the train; and no notice was usually given him other than this.

"The gates of the depot were closed at half past four o'clock. The goods described in the receipt dated November 2d were discharged from the cars, and put on the platform in a fit state for delivery, before five o'clock, but at what precise hour is not known; and this was the usual course when goods from any cause were not delivered before the gates were closed. But after Ames left, the cars were put in such a position outside of the depot that the said goods could have been taken directly from them before four and a half o'clock, had Ames remained; though that would not have been in the general course of delivery, and could only have been done by an arrangement with Ames

for that purpose; and no offer or suggestion was made to him that they could be so taken. Ames frequently took goods from the cars themselves without waiting for their being discharged on to the platform, when it was for the mutual convenience of both parties that he should do so.

"The goods, described in the receipt dated October 31st, 1850, arrived on Saturday, the 2d of November, and were discharged from the cars some time during that day, and were ready for delivery at least as early as Monday morning. No notice had been given to the plaintiffs of their arrival, otherwise than that Ames knew that they were so ready, and could have taken them, so far as said railroad was concerned, if he had seen fit. The agent of the plaintiffs where these goods were put on the cars knew that, according to the usual course of the trains they would arrive in Boston Saturday, about noon."

The arguments were had at November term, 1853.

C. G. Loring, for the plaintiffs.

R. Choate, and *G. Minot*, for the defendants.

SHAW, C. J. — The liability of carriers of goods by railroads, the grounds and precise extent and limits of their responsibility, are coming to be subjects of great interest and importance to the community. It is a new mode of transportation, in some respects like the transportation of ships, lighters, and canal boats on water, and in others like that by wagons on land; but in some respects it differs from both. Though the practice is new, the law by which the rights and obligations of owners, consignees, and of the carriers themselves, are to be governed, is old and well established. It is one of the great merits and advantages of the common law, that instead of a series of detailed practical rules, established by positive provisions, and adapted to the precise circumstances of particular cases, which would become obsolete and fail, when the practice and course of business, to which they apply, should cease or change, the common law consists of a few broad and comprehensive principles, founded on reason, natural justice, and enlightened public policy, modified and adapted to the circumstances of all the particular cases which fall within it. Those general principles of equity and policy are rendered precise, specific, and adapted to practical use, by usage which is the proof of their general fitness and common convenience, but still more by judicial exposition, so that, when in a course

of judicial proceeding, by tribunals of the highest authority, the general rule has been modified, limited and applied according to particular cases, such judicial exposition, when well settled and acquiesced in, becomes itself a precedent, and forms a rule of law for future cases, under like circumstances. The effect of this expansive and comprehensive character of the common law is, that whilst it has its foundation in the principles of equity, natural justice, and that general convenience which is public policy; although these general considerations would be too vague and uncertain for practical purposes, in the various and complicated cases of daily occurrence, in the business of an active community; yet the rules of the common law, so far as cases have arisen and practices actually grown up, are rendered, in a good degree, precise and certain, for practical purposes, by usage and judicial precedent. Another consequence of this expansive character of the common law is, that when new practices spring up, new combinations of facts arise, and cases are presented for which there is no precedent in judicial decision, they must be governed by the general principle applicable to cases analogous, but modified and adapted to new circumstances, by reasonable considerations of fitness, propriety and justice, which grow out of those circumstances. The consequence of this state of the law is, that when a new practice or new course of business arises, the rights and duties of parties are not without a law to govern them: the general considerations of reason, justice and policy, which underlie the particular rules of the common law, will still apply, modified and adapted, by the same considerations, to the new circumstances. If these are such as to give rise to controversy and litigation, they soon, like previous cases, come to be settled by judicial exposition, and the principles thus settled soon come to have the effect of precise and practical rules. Therefore, although steamboats and railroads are but of yesterday, yet the principle which governs the rights and duties of carriers of passengers, and also those which regulate the rights and duties of carriers of goods, and of the owners of goods carried, have a deep and established foundation in the common law, subject only to such modifications as new circumstances may render necessary and mutually beneficial.

We understand the merchandise depot, [referred to in the statement of facts,] to be a warehouse, suitably inclosed

and secured against the weather, thieves and other like ordinary dangers, with suitable persons to attend it, with doors closed in the night time, and locked like other warehouses, used for the storage of merchandise; that it is furnished with tracks, on which the loaded cars run directly into the depot to be unloaded; that there are platforms on the sides of the track on which the goods are first placed; that if not immediately called for and taken by the consignees, they are separated according to their marks and directions, and placed by themselves in suitable situations within the depot, there to remain a reasonable and convenient time, without additional charge, until called for by parties entitled to receive them.

The question is, whether, under the circumstances of this case, the defendants are liable.

That railroad companies are authorized by law to make roads as public highways, to lay down tracks, place cars upon them, and carry goods for hire, are circumstances which bring them within all the rules of the common law, and make them eminently common carriers. Their iron roads, though built, in the first instance, by individual capital, are yet regarded as public roads, required by common convenience and necessity, and their allowance by public authority can only be justified on that ground. The general principle has been uniformly so decided in England and in this country, and the point is to ascertain the precise limits of their liability. This was done to a certain extent in this court, in a recent case, with which, as far as it goes, we are entirely satisfied. *Thomas v. Boston and Providence Railroad Co.*, 10 Met. 472.

Being liable as common carriers, the rule of the common law attaches to them, that they are liable for losses occurring from any accident which may befall the goods during the transit, except those arising from the act of God, or a public enemy. It is not necessary now to inquire into the weight of those considerations of reason and policy on which the rule is founded; nor to consider what casualty may be held to result from an act of God, or a public enemy; because the present case does not turn on any such nice distinction. It is sufficient, therefore, to state and affirm the general rule. In the present case, the loss resulted from a fire, of which there is no ground to suggest that it was an act of God; and it is equally clear that it did not result from any default or negligence on the part of

the company, though the goods remained in their custody. If, at the time of the loss, they were liable as common carriers, they must abide by the loss; because, as common carriers, they were bound as insurers, to take the risk of fire, not caused by the act of God, and in such case, no question of default or negligence can arise. Proof that it was from a cause for which they neither by themselves nor by their servants were in any degree chargeable, could amount to no defence, and would therefore be inadmissible in evidence. If, on the contrary, the transit was at an end, if the defendants had ceased to have possession of the goods as common carriers, and held them in another capacity, as warehouse-men, then they were responsible only for the care and diligence which the law attaches to that relation; and this does not extend to a loss by an accidental fire, not caused by the default or negligence of themselves, or of servants, agents or others for whom they are responsible.

The question then is, when and by what act the transit of the goods terminated. It was contended, in the present case, that in the absence of express proof of contract or usage to the contrary, the carrier of goods by land is bound to deliver them to the consignee, and that his obligation as carrier does not cease till such delivery.

This rule applies, and may very properly apply, to the case of goods transported by wagons and other vehicles, traversing the common highways and streets, and which therefore can deliver the goods at the houses of the respective consignees. But it cannot apply to railroads, whose line of movement and point of termination are locally fixed. The nature of the transportation, though on land, is much more like that by sea, in this respect, that from the very nature of the case, the merchandise can only be transported along one line, and delivered at its termination, or at some fixed place by its side, at some intermediate point. The rule in regard to ships is very exactly stated in the opinion of Buller, J. in *Hyde v. Trent and Mersey Navigation Co.* 5 T. R. 397. "A ship trading from one port to another has not the means of carrying the goods on land; and, according to the established course of trade, a delivery on the usual wharf is such a delivery as will discharge the carrier."

Another peculiarity of transportation by railroad is, that the car cannot leave the track or line of railroads on which it moves; a freight train moves with rapidity, and makes

very frequent journeys, and a loaded car, while it stands on the track, necessarily prevents other trains from passing or coming to the same place ; of course it is essential to the accommodation and convenience of all persons interested, that a loaded car, on its arrival at its destination, should be unloaded, and that all the goods carried on it, to whomsoever they may belong, or whatever may be their destination, should be discharged as soon and as rapidly as it can be done with safety. The car may then pass on to give place to others, to be discharged in like manner. From this necessary condition of the business, and from the practice of these transportation companies to have platforms on which to place goods from the cars, in the first instance, and warehouse accommodation by which they may be securely stored, the goods of each consignment by themselves in accessible places, ready to be delivered, the court are of opinion that the duty assumed by the railroad corporation is — and this being known to owners of goods forwarded, must in the absence of proof to the contrary, be presumed to be assented to by them so as to constitute the implied contract between them — that they will carry the goods safely to the place of destination, and there discharge them on the platform, and then and there deliver them to the consignee or party entitled to receive them, if he is there ready to take them forthwith ; or if the consignee is not there ready to take them, then to place them securely, and keep them safely a reasonable time, ready to be delivered when called for. This, it appears to us, is the spirit and legal effect of the public duty of the carriers ; and of the contract between the parties, when not altered or modified by special agreement, the effect and operation of which need not here be considered.

This we consider to be one entire contract for hire ; and although there is no separate charge for storage, yet the freight to be paid, fixed by themselves, as a compensation for the whole service, is paid as well for the temporary storage, as for the carriage. This renders both the services, as well the absolute undertaking for the carriage as the contingent undertaking for the storage, to be services undertaken to be done for hire and reward. From this view of the duty and implied contract of the carriers by railroad, we think there result two distinct liabilities ; first, that of common carriers, and afterwards that of keepers for hire. or warehouse keepers ; the obligations of each of which are regulated by law.

We may then say, in the case of goods transported by railroad, either that it is not the duty of the company as common carriers, to deliver the goods to the consignee, which is more strictly conformable to the truth of the facts; or, in analogy to the old rule, that delivery is necessary, it may be said that delivery by themselves as common carriers, to themselves as keepers for hire, conformably to the agreement of both parties, is a delivery which discharges their responsibility as common carriers. If they are chargeable after the goods have been landed and stored, the liability is one of a different character, one which binds them only to stand to losses occasioned by their fault or negligence. Indeed, the same doctrine is distinctly laid down in *Thomas v. Boston and Providence Railroad*, 10 Met. 472, with the same limitation. The point that the same company, under one and the same contract, may be subject to distinct duties, for a failure in which they may be liable to different degrees of responsibility, will result from a comparison of the two cases of *Garside v. Trent and Mersey Navigation Co.* 4 T. R. 581, and *Hyde v. Same Company*, 5 T. R. 389. See also *Van Santvoord v. St. John*, 6 Hill, 157, and *McHenry v. Philadelphia, Wilmington and Baltimore Railroad*, 4 Harrington, 448.

The company, having received an adequate compensation for the entire service, if they store the goods, are paid for that service; they are depositaries for hire, and of course responsible for the security and fitness of the place and all precautions necessary to the safety of the goods, and for ordinary care and attention of their servants and agents, in keeping and delivering them when called for. This enforces the liability of common carriers, to the extent to which it has been uniformly carried by the common law, so far as the reason and principle of the rule render it fit and applicable, that is, during the transit, and affords a reasonable security to the owner of goods for their safety, until actually taken into his own custody.

The principle, thus adopted, is not new; many cases might be cited; one or two will be sufficient. *Rowe v. Pickford*, 8 Taunt. 83; *In re Webb*, 1b. 443. . . .

This view of the law, applicable to railroad companies, as common carriers of merchandise, affords a plain, precise and practical rule of duty, of easy application, well

adapted to the security of all persons interested ; it determines that they are responsible as common carriers until the goods are removed from the cars and placed on the platform ; that if, on account of their arrival in the nighttime, or at any other time, when by the usage and course of business, the doors of the merchandise depot or warehouse are closed, or for any other cause they cannot then be delivered ; or if for any reason the consignee is not there ready to receive them, it is the duty of the company to store them and preserve them safely, under the charge of competent and careful servants, ready to be delivered, and actually deliver them when duly called for by parties authorized and entitled to receive them ; and for the performance of these duties after the goods are delivered from the cars, the company are liable, as warehousemen, or keepers of goods for hire.

It was argued in the present case, that the railroad company are responsible as common carriers of goods, until they have given notice to consignees of the arrival of goods. The court are strongly inclined to the opinion, that in regard to the transportation of goods by railroad, as the business is generally conducted in this country, this rule does not apply. The immediate and safe storage of the goods on arrival, in warehouses provided by the railroad company, and without additional expense, seems to be a substitute better adapted to the convenience of both parties. The arrivals of goods at the larger places, to which goods are thus sent, are so numerous, frequent and various in kind, that it would be nearly impossible to send special notice to each consignee, of each parcel of goods or single article forwarded by the trains. We doubt whether this is conformable to usage, but perhaps we have not facts enough disclosed in this case to warrant an opinion on that point. As far as the facts on this point do appear, it would seem probable, that persons frequently forwarding goods, have a general agent, who is permitted to inspect the way-bills, ascertain what goods are received from his employers, and take them as soon as convenient after their arrival. It also seems to be the practice for persons forwarding goods to give notice by letter, and inclose the railroad receipt, in the nature of a bill of lading, to a consignee or agent, to warn him to be ready to receive them. From the two specimens of the form of receipt given by these companies, produced in the present

case, we should doubt whether the name of any consignee or agent is usually specified in the receipt and on the way-bill. The course seems to be, to specify the marks and numbers, so that the goods may be identified on inspection and comparison with the way-bill. If it is not usual to specify the name of a consignee, in the way-bill, as well as on the receipt, it would be impossible for the corporation to give notice of the arrival of each article and parcel of goods. In the two receipts produced in this case, which are printed forms, a blank is left for the name of a consignee, but it is not filled, and no consignee in either case is named. The legal effect of such a receipt and promise to deliver, no doubt is, to deliver to the consignor or his order. If this is the usual or frequent course, it is manifest that it would be impossible to give notice to any consignee; the consignor is *primâ facie* the party to receive, and he has all the notice he can have. But we have thought it unnecessary to give a more decisive opinion on this point, for the reason, already apparent, that in these receipts no consignee was named, and for another equally conclusive, that Ames, the plaintiffs' authorized agent, had actual notice of the arrival of both parcels of goods.

In applying these rules to the present case, it is manifest that the defendants are not liable for the loss of the goods. Those which were forwarded on Saturday arrived in the course of that day, lay there on Sunday and Monday, and were destroyed in the night between Monday and Tuesday. But the length of time makes no difference. The goods forwarded on Monday were unladen from the cars, and placed in the depot before the fire. Several circumstances are stated in the case, as to the agent's calling for them, waiting, and at last leaving the depot before they were ready. But we consider them all immaterial. The argument strongly urged was, that the responsibility of common carriers remained until the agent of the consignee had an opportunity to take them and remove them. But we think the rule is otherwise. It is stated, as a circumstance, that the train arrived that day at a later hour than usual. This, we think, immaterial; the corporation do not stipulate, that the goods shall arrive at any particular time. Further, from the very necessity of the case, and the exigencies of the railroad, the corporation must often avail themselves of the night-time, when the road is less

occupied for passenger cars; so that goods may arrive and be unladen, at an unsuitable hour in the night, to have the depot open for the delivery of the goods. We think, therefore, that it would be alike contrary to the contract of the parties, and the nature of the carriers' duty, to hold that they shall be responsible as common carriers, until the owner has practically an opportunity to come with his wagon and take the goods; and it would greatly mar the simplicity and efficacy of the rule, that delivery from the cars into the depot terminates the transit. If, therefore, for any cause, the consignee is not at the place to receive his goods from the car as unladen, and in consequence of this they are placed in the depot, the transit ceases. In point of fact, the agent might have received the second parcel of goods in the course of the afternoon on Monday, but not early enough to be carried to the warehouses, at which he was to deliver them; that is, not early enough to suit his convenience. But for the reasons stated, we have thought this circumstance immaterial, and do not place our decision for the defendants, in regard to this second parcel, on that ground.

Judgment for the defendants.

Vice Admiralty Court, Lower Canada, June 2, 1854.

THE NIAGARA, Taylor; THE ELIZABETH, Nowell.

*Collision — Course to be pursued by Vessels in danger of Colliding —
Lookout — Lights.*

THESE cases originated in a collision, which took place on the third of November last, between the ship Niagara, while sailing down the river St. Lawrence on her homeward voyage to Liverpool, and the bark Elizabeth, coming up in tow of the steamer Providence, under the circumstances noticed in the following judgment of the Court:

THE COURT — (HON. HENRY BLACK.) The Niagara, a vessel of about 422 tons burthen, laden principally with grain and deals, sailed from Quebec on her homeward voyage to Liverpool, in the afternoon of Thursday, the 3d of November last, in charge of a regular branch pilot; and at about the hour of a quarter to seven on the same

day had gone round Point Levi, and was about abreast of Indian Cove, the wind being then at west by north, or west-north-west, blowing a moderate breeze, the tide being flood and the ship having all its sails set except the studding sails, and being about mid-channel, or rather to the southward of it, and going down the river at the rate of about three miles an hour. She had passed two ships at anchor, the one on the starboard and the other on the port side, the one apparently lying on the north side of the channel and the other on the south side of it. At the same time the bark *Elizabeth*, a vessel having between three and four hundred tons of railroad iron on board, was coming up the river St. Lawrence, on her outward voyage from England to Quebec, in charge of a regular branch pilot, and in tow of the steamer *Providence*, which was engaged to take her to her intended wharf at Point Levi. The tow-line was about thirty fathoms in length; she had all her sails furled and her yards braced up, the wind being ahead, and was going at the rate of about five miles an hour, that is, two miles faster than the flood tide, which carried her about three miles an hour. The moon was then about three days old. At about a quarter to seven the *Elizabeth*, and the steamboat in tow of which she was, had also got abreast of Indian Cove. The night at the time seems from the evidence to have been reasonably clear, and sufficiently so for lights to be seen at a moderate distance; though there is some slight discrepancy on this point, the witnesses from the *Elizabeth* and from the steamer declaring the night was very clear and starlight, and that the moon had been visible early in the evening, and that they could see both shores, and the light on board the ships in the harbor and the lights of the town: while the witnesses from the *Niagara* say that it was clear to the westward, but hazy to the eastward, and that the moon was clouded and not to be seen; they do not however pretend that lights could not be seen at a reasonable distance, in fact the look-out man of the *Niagara* (Owen Evans) says that it was a pretty clear night, and that he saw the steamer *Providence* about twenty minutes before the collision which forms the subject of the present controversy. It is sufficiently proved that the *Niagara* had a light at her bowsprit end, "a reflecting powerful light;" that the steamer had two ordinary lights, one on each paddle box, and a bright red light forward; and that the

Elizabeth had a light in her starboard fore rigging, about sixteen feet above the deck. It appears that each of the three vessels was navigated by a competent number of officers and men, and was staunch, tight, and in good order.

Under these circumstances a collision took place between the Niagara and the Elizabeth, the Niagara, according to some of the witnesses, striking her cut-water against the starboard bow of the Elizabeth, but according to others the starboard bow of each vessel striking the starboard bow of the other.

With regard to the circumstances which immediately preceded and occasioned the collision, the evidence, as usually occurs in like cases, is conflicting.

No blame is attributed by either party to the steamer, and the only question raised as to the Elizabeth's action, is, To show an omission whether she exercised her power of sheering properly or improperly, and it may be that in porting her helm, when the Niagara was close upon her, she did right. The general rule is, that when two vessels are approaching each other, both having the wind large, and are approaching each other, so that if each continued in her course, there would be danger of collision, each shall port helm, so as to leave the other on the larboard hand in passing; but it is not necessary that because two vessels are proceeding in opposite directions, there being plenty of room, that the one vessel should cross the course of the other, in order to pass her on the larboard. The questions arising in these actions seem to be :

1. Whether from the whole tenor of the evidence it appears that there was a proper and efficient look-out kept on board the Niagara, and whether timely notice was given by the look-out man, of the proximity of the steamer and the Elizabeth?

2. Whether at the time when the lights of the steamer were seen by the Niagara, the Niagara was pursuing a direct course down the river, or was, in fact, standing too much to the southward, and crossing the channel and the course of the steamer and her tow?

3. Whether, when the danger of collision was seen by the Niagara's pilot and people, the most seamanlike and proper means were adopted by them to avoid the danger, and more particularly whether it was right to put her helm a starboard?

4. Whether, when the danger of collision was seen by the people of the *Elizabeth*, the most seamanlike and proper means were adopted by them to avoid the danger, and more particularly whether it was right to put her helm to port?

5. And generally, whether any rule of navigation or of seamanship was violated by either, and which of the vessels, or whether there was any fault, neglect of duty, or want of proper precaution or skill on the part of those in charge of either, and of which vessel; or did the accident arise from circumstances over which neither vessel had any control; and is it therefore to be considered as an unavoidable misfortune, for which neither can be blamed or held responsible?

Upon these several points, the Court will avail itself of the long practical experience and great professional skill of Captain Jesse Armstrong, the Harbor Master of Quebec and one of the Wardens of the Trinity House, and of Lieutenant Edward D. Ashe, of the Royal Navy and Superintendent of the Observatory at Quebec.

At a subsequent sitting of the Court, Captain Armstrong and Lieutenant Ashe, who had heard the arguments in the case as assessors, gave in the following answers to the questions submitted for their consideration:

"1. The look-out man states that he saw the steamer *Providence* about twenty minutes before the collision; but no precautions were taken by the *Niagara* to avoid her until the steamer was so close, that notwithstanding the *Niagara* answered her helm quickly, she grazed the after part of the steamer with her martingale. From this one of two things is evident, either the pilot or officer in charge of the deck, did not see the steamer *Providence* in time to avoid her, in which case there was a want of proper look-out; or, if he did see her, there was great carelessness shown in approaching so close to her when he had plenty of room, and might have passed either to the northward or southward of the steamer and her tow. The evidence given by Charles Nolet, a third party, and a calm spectator of the collision, is of much importance. He says: 'and the witness believes that the steamer was not perceived by the *Niagara* until too late, because he is certain that if she had been seen in time by the *Niagara*, and had then the necessary measures been taken, the collision would have been easily avoided.'

"2. We believe that the *Niagara* was steering a little to the south shore in order to pass the *Hampden* on the star-

board side ; but in so doing there was nothing to prevent her, the Niagara, keeping a bright look-out and taking proper measures to avoid lights that might have been seen ahead.

"3. When the pilot appears to have seen the danger of collision, the only thing that could be done at that time, was putting the helm of the Niagara a starboard.

"4. The Elizabeth followed the rules laid down for vessels meeting each other ; and it would have been well for all parties if her tug had set her the example in porting her helm in time. Be this as it may, it is pretty clear that if a tug tries to pass on one side of a vessel, and her tow tries to pass on the other side, without either cutting, slashing or letting go the tow rope, a collision will inevitably take place. If it was supposed by those on board of the Elizabeth, that a collision was unavoidable, then they did right in porting their helm in order to get the shock on the strongest part of the vessel.

"5. There was no want of seamanship shown on either side, but a great want of caution on the part of the Niagara. It should be imperative on all vessels, particularly steamers from the quickness of their motions, that they be compelled to carry their lights according to law, which would in all cases determine two very essential points ; first, that she is a steamer ; secondly, how she is steering, the latter a most important point, which generally can be easily determined when proper lights are carried ; that is to say, a red light at the bow, and a white light at the mast head or flag-staff (see the 50th Trinity House by-law), which regulation the steamer Providence did not comply with at the time of the collision. It appears to us that if the steamer Providence had been keeping a good look-out, and had immediately put her helm a port, which she was bound to do on first perceiving the Niagara, no collision would have taken place. In conclusion, we are of opinion that the Niagara is responsible for the damages done to the Elizabeth."

THE COURT. — The professional gentlemen by whom I have been assisted in this case, are of opinion, and I concur with them, that the Elizabeth is not chargeable with any misconduct or mismanagement as regards the circumstances which led to the collision. Even with respect to her porting her helm when the Niagara was close upon her,

those gentlemen think that she was fully justified, if she thought the collision inevitable, and only wished to make it as harmless as possible. That this was the opinion of those on board her, is clear from the evidence; their only hope then was that the Niagara might pass between the Elizabeth and the steamer, and a man was ready on board the Elizabeth to cut the tow rope if necessary. I also concur with those gentlemen in thinking that there was sufficient neglect or misconduct on the part of the Niagara to make her liable to the owners of the Elizabeth, for the damages resulting from the collision. There was no proper and sufficient look-out on board the Niagara, nor were the proper means adopted for avoiding collision after the time when the steamer's lights were seen by the Niagara over her starboard bow. Her having adopted the most seaman-like and proper course when the collision was all but inevitable, does not exempt her from responsibility.

Neither in the pleadings nor in the evidence is there any allegation that the fault was with the steamer. It may be possible that if she had ported her helm at a very early period and gone to the northward, the vessels might have passed clear; but there was then evidently sufficient room for them to pass clear without her doing so; and it is far from improbable that her doing so might have brought her into contact with the Niagara, as the steamer's people assert; and if she had done so, and mischief had ensued, she might have been liable; for, as is correctly said by Chief Justice BEST: "Although there may be a rule of the sea, yet a man, who has the management of one ship, is not allowed to follow that rule, to the injury of the vessel of another, when he could avoid the injury, by pursuing a different course."¹ Although there may be some discrepancy in the evidence on this point, yet I see nothing to justify my concluding that there was not a sufficient look-out on board the steamer. As regards her lights, I incline to think that she complied substantially with the Trinity House rule,² as far as circumstances allowed. She had the bright

¹ *Handyside v. Wilson*, 3 Carrington & Payne, 538.

² That all steamboats, whether at anchor, or under way, in the river St. Lawrence, within the port of Quebec, shall at night show a bright red light in the bow, and a bright white light at the mast head, and if any such boat has no mast, the white light shall be on the stern sufficiently high to be seen, over the paddle boxes; under a penalty not exceeding ten pounds currency, to be recoverable from the master or other person in charge of such steamboat, for every contravention of this regulation. — 50th sec. of By-laws made 12th April, 1850.

red light in the bow, and a bright white light over each paddle box. It does not appear that she had any mast, and being engaged in towing it may be that she could not carry a flag-staff at the stern, without its being in the way of the tow rope; and if so, she seems to have done all that could be expected under the circumstances, towards obeying the rule, by carrying white lights on each side sufficiently high to be seen over the paddle boxes. In point of fact the Niagara's people saw these lights, and even supposing them to have been insufficient, the accident did not arise from such insufficiency. Unless it appeared that the accident arose exclusively from the misconduct of the steamer, the responsibility could not be transferred to her so as to relieve the other vessels. I am not called upon in the present case to do more than pronounce judgment as between the Elizabeth and the Niagara; nor will my judgment prevent the recourse of either, against the steamer, if the fault were exclusively hers, a point which is certainly not established by evidence in the present suit; the judgment is therefore in favor of the Elizabeth and against the Niagara.

From this judgment the owner of the Niagara asserted on the 14th inst., an appeal to Her Majesty in Her Privy Council.

Mr. *Allyn*, for the *Elizabeth*.

Messrs. *Stuart & Vannovous*, for the *Niagara*.

Abstracts of Recent American Decisions.

SELECTIONS FROM 2 WALLACE, JR.

[United States Circuit Court. — Third Circuit.]

Abandonment. See *Collision*.

Agency.—Where a larger vessel — a ship — is in tow of a small one — a steam tug — the latter is in law regarded as the servant of the former; and being thus its agent, and so bound to obey its orders, is not responsible for damage in the proper course of the employment.—*Smith v. The Creole and The Sampson*.

Assignment.—1. A general voluntary assignment, valid by the laws of one of the United States — though assumed to be void if it had been made in another — will carry property in that other against an attaching creditor there.—*Caskie v. Webster*.

2. The case of *Ingraham v. Geyer*, decided A. D. 1816, in the Supreme Court of Massachusetts, in which an opposite doctrine was held, is not law.—*Id*

Clerk's Commissions.—A Clerk of the Circuit Courts of the United States is not, under the act of February 26th, 1853, relating to "Clerks' Fees," nor otherwise, entitled to commissions for "receiving, keeping, and paying out money," unless the fund has actually passed into the Court, or through the clerk's official hand, or has been agreed to be considered as having done so. The fact that the money is subject to the decree of the Court, it not being in the Court's registry, is not enough to give the clerk a right to commissions.—*Ex parte Plitt*.

Collision.—1. Although the Court cannot establish a rule to bind vessels navigating the high seas to carry signal lights, yet where one vessel does so and another does not, the Court, in case of a collision, will go some way to treat the dark boat as the wrong doer.—*Barque Delaware v. Steamer Osprey*.

2. The Court going in advance of hitherto adjudicated cases, would seem to enforce the obligation upon all boats navigating bays and rivers, not only to show lights on an approach, but to carry them constantly.—*Id.*

3. Where a vessel is injured and sunk by collision in such a place, or under such circumstances, that for a small sum of money in comparison with the value of the vessel and cargo, she can be raised and repaired, and the cargo recovered with slight damage, her owners have no right to abandon her and claim for a total loss. The doctrine of abandonment as connected with cases of insurance, has not been imported into Courts of Admiralty.—*Clarke v. The Steamer Fashion*.

4. A vessel which moors alongside of another at a wharf or elsewhere, becomes responsible to the other, for all the injuries resulting from her proximity, which human skill or precaution could have guarded against.—*Vantine v. The Lake*.

5. The schooner L., on entering a dock at high tide, was directed by her consignees to be moored to an adjoining wharf of which they were lessees, outside of the M. J., a smaller vessel. There was not in the dock during part of the ebb, enough water for The L., though there was sufficient for The M. J.; of which fact the consignees, but not the master of The L., were aware. No objection was made at the time from The M. J., nor any caution given. On the tide receding, The L., on this account and from the bottom of the dock being banked up in the middle from accidental causes, (with which the consignees were also acquainted,) careened over on The M. J., crushing her timbers, and causing her to fill and sink. As soon as the danger was perceived, a measure of prevention was suggested by The M. J., but rejected as useless.

Held, that The L. was bound to know the depth of water in the dock, or at any rate was responsible for the directions of the consignees, who had full knowledge; and that she had not taken proper precaution before or after the injury. The L. condemned in damages.—*Id.*

6. Besides the costs of repairs in this case, charges for wharfage while repairing; for the time of one of the owners, and of the crew in raising and clearing out the injured vessel; and for the loss of profits to the vessel while sunk, and during the time she was being repaired, allowed by the Court in the assessment of damages.—*Id.*

Conflict of Laws. See Assignment.

Consul.—A consul of a Foreign Power, though not entitled to represent his sovereign in a country where the sovereign has an ambassador, is entitled to intervene for all subjects of that Power interested; and though he should not set forth the particulars of his claim, still it will do if they can be fully gathered from the allegations of the libel and the case it sets forth.—*Robson v. The Huntress*.

Copyright.—A prose translation (having no qualities of a paraphrase)

of a copyright prose romance, which the author had caused himself to be translated in a way he liked, and copyrighted, is not an infringement of the author's copyright of the original.—*Stowe v. Thomas*.

Damages. See *Collision — Fugitive Slave Law*.

Equity—Where a bill sets forth such leading facts as do not, when analyzed, show a case of fraud or mistake—allegations or averments in the bill that there was fraud or mistake, and the expressions “fraudulently,” “deceitfully,” “by mistake,” &c., interspersed throughout it, will not bring the case within equitable jurisdiction, even on a demurrer to the bill.—*Magniac v. Thomson*.

2. Admitting, for the sake of argument, that the allegation of a mistake of the law would give jurisdiction to a court of equity in a common case, and be a ground for relief; yet the court will not listen to the allegation that a member of the bar has made such a mistake. It can hardly be successfully averred even by the party whose counsel, he would confess, has made it.—*Ib.*

3. Where one, having arrested his debtor defendant on a *ca. sa.*, sets him at liberty on certain terms, at his instance, it being “expressly acknowledged” by the defendant that this is done “for his accommodation, without any prejudice whatever to arise to the plaintiff’s right by the enlargement” as aforesaid, “or otherwise howsoever;” the debt is paid at law. No further execution of any sort can be issued there. And the agreement having been drawn and signed by the plaintiff’s own attorney, a learned and able counsellor at law, a court of equity will not interpose to enjoin the defendant from pleading this discharge as payment, by allegations in a bill demurred to, that there was either a mistake common to both parties as to the effect of the agreement; or else that the plaintiff not knowing its effect, while the defendant did know it, it would be a fraud in the defendant now to profit of the plaintiff’s misconception or ignorance of what he was doing; and set up at law the payment by his liberation on the *ca. sa.*—*Ib.*

4. Where a court of equity, having heard a case on full proofs, is well satisfied of the originality of an invention, the regularity of a patent, and of the fact of infringement, it will not send the case to a jury to have its verdict prior to granting a perpetual injunction. It will grant it at once, especially if the questions in the case, though questions of fact, are of that kind that a court can decide them on the testimony of men of science, as well as, or better than a jury; and where a jury trial would be long, costly or troublesome.—*Goodyear v. Day*.

Evidence.—1. On an indictment for treason, everything tending to show that there was an intention to make public resistance to a law of the United States, is entirely evidence in chief, and cannot be received in rebuttal.—*United States v. Hanway*.

2. On an indictment for treason, the intent of the act, being essential, it is competent to show, that a long time (say within nine months) before the alleged treasonable occurrence, facts had occurred, and rumors were prevalent in the neighborhood, which would explain certain particulars relied on, to show treasonable intent, and make them show a different intent.—*Ib.*

3. A person who stands indicted of treason along with the defendant in another indictment not now trying, is a competent witness for him in an indictment now trying, and in which such person is not included.—*Ib.*

4. On an indictment under a law which makes criminal certain acts done on board a vessel owned in whole or in part by a citizen of the United States, an American Registry is not even *prima facie* evidence of such ownership; though such registry is made by the government only on the

pre-supposition of such ownership, and after oath by one or more persons of such ownership by them. Nor is general reputation of such ownership any evidence of it. Ownership in such a case is a fact to be proved as other facts.—*United States v. Brune*.

5. Parol evidence cannot be received to show in what sense a testator used certain words, they being well settled terms of law: e. g., to show that a testator, who lived most of his life in England, though technically domiciled in Pennsylvania, used the term 'heir at law,' not in the Pennsylvania statute sense, this being its true and settled legal sense, but in the popular sense of heir by the English Common Law.—*Aspden's Estate*.

Fugitive Slave Law.—A law of Congress enacts, that if any person shall harbor or conceal a fugitive from labor after notice that he or she is so, such person shall forfeit and pay \$500, to be recovered by action of debt; saving moreover to the owner of such fugitive a right of action on account of the injuries, &c.

1. Notice here means knowledge; and harboring means entertaining or sheltering a fugitive with the purpose of encouraging him in his desertion of his master; with the purpose to further his escape, and to impede and frustrate the master's reclamation of him. 'Harboring' is not here synonymous with 'concealing' used in the same phrase with it: and there may be harboring without any concealment.—*Van Metre v. Mitchell*.

2. Under this act, if the plaintiff sues in debt for the penalty of \$500, which it gives for illegally harboring and concealing, he may recover it upon proof of such harboring or concealment, irrespectively of any proof of actual damage to himself. But if he brings 'case on account of injuries,' for which the act saves a right of action, he can recover only to the amount of actual damage, which he shows he has suffered.—*Oliver v. Weakley*.

Habeas Corpus.—1. On a habeas corpus, in a question of conflict between State and Federal process, counsel have no right to appear in defence of the State process, unless in some way authorized by the State or its proper officers; and after return made, the Court refused to hear as counsel a member of the bar, who showed no such authority, nor any authority beyond that of the person executing the State writ.—*Ex parte Jenkins*.

2. The Court may issue a habeas corpus to bring before it one of its deputy Marshals, arrested and put in gaol under State process—whether of a justice of the peace or of the Court, or the Supreme Court—whether criminal or civil—for his conduct in executing a writ issued under the Fugitive Slave Law; may inquire into the cause of commitment, and, if illegal, order a complete discharge. And in the case of an arrest, on State process, of an officer of the United States, for an alleged abuse of his powers, this Court will not only hear evidence to disprove the truth of the affidavits upon which the State authorities proceeded, but will, independently of such proof, consider those affidavits; and if, in the judgment of this Court, those affidavits do not contain a *prima facie* ground for arrest, will discharge the federal officer, without hearing any counter-evidence. As a general thing, moreover, in the case of such an officer the Court will discharge him unless there be a positive oath of merits from the plaintiff, or a sworn detail of circumstances from others, to supply its place.—*Id.*

3. If an officer of the United States has been arrested to answer an indictment found by a State Court, for riot, assault and battery, and assault with attempt to kill, the indictment not showing that the alleged offences were committed while the officer was professing to act under a law of the United States, or under some order, process, or decree of some judge or Court thereof, this Court, on a habeas corpus, where the petition of the officer denies the offence, and avers that what is alleged as offence was

done in proper execution of an order, process, or decree of a federal court, will go outside the indictment, and hear evidence to show the truth of the facts set forth by the officer. — *Ib.*

Injunction. See *Equity*.

Insurance.—1. Seaworthiness is not a condition implied in regard to time policies, except under particular circumstances, if it is at all. — *Jones v. The Insurance Co.*

2. The Court supposing a case not before it, says, It may indeed be true, that in a time policy there is a warranty of seaworthiness at the commencement of the risk, so far as it lay in the power of the assured to effect it. But in such case the plea must state such facts as show either that at the time the insurance commenced the ship was in her original port of departure, and commenced her voyage in an unseaworthy condition, and so continued till the time of her loss; or, that having come into a distant port in a damaged condition before or after the commencement of the risk, where she might or ought to have been repaired, the owner or his agents neglected to repair her, and that she was lost in consequence. *Ib.* See *Collision*.

Jurisdiction.—1. In suing on a chose in action, if the plaintiff be not a citizen of the same State as the defendant, his right to sue is not taken away by the fact that the chose may have passed to him through the hands of persons who were citizens of that State, and so unable to prosecute a suit in this Court, provided the party to whom the chose was originally given was not such a citizen, and could himself have therefore prosecuted such a suit — *Milledollar v. Bell*.

See *Habeas Corpus*.

Lien.—The lien for wages of a seaman, who is himself a part-owner of a vessel on which he serves, is discharged by a sheriff's sale of her, on execution against her owners. And this, although as a general principle, a sheriff's sale of a vessel does not discharge the sailor's lien upon her. — *Gallatin & Wood v. The Pilot*.

See *Release of Lien*.

Patent.—1. It is not necessary for the protection of a patent, that the patentee should be the first person who conceived the practicability or existence of the thing patented, but who, though making important experiments, was unable to bring them to any successful or valuable result. He who reduces speculation to practice; whose experiments result in discovery, and who then afterwards first puts the public into practical and useful possession of the compound, art, machine or product, is entitled to the patent right. — *Goodyear v. Day*.

2. Patents are benignly construed in favor of inventors; and in considering the validity of a patent, objected to for want of a proper "description of the invention or discovery" having been filed previously to its issue, this description, even if quite wide of truth when taken literally, may be aided and made good by the description of "the manner and process of making, constructing, using and compounding the same." Thus, where the "description of the invention or discovery" described a *process*, and did not describe a *product*, but the description of "the manner and process" showed that the purpose and merit of the process was the production of a valuable '*fabric*,' it was held, in a suit for infringing the patent, by improperly using the product, to be no objection that the "description of the discovery or invention" described not it, but a *process*; the "description of the manner and process" showing that the purpose and merit of the process was the production of a '*fabric*.' — *Goodyear v. The Railroad*.

3. When a full and candid description of the manner and process of making and compounding any invention or discovery, describes such manner in

a concrete and illustrative, rather than in an abstracted and essential way, the description will cover every kind of application which was meant to come within, and which men of science can see is really involved in the principle attempted to be described. And so conversely, where an abstract description or abstract term is used, or an agent is described generally, rather than in its forms, the application of the thing, and not the form of the thing being patented, — this is enough. The last point is the one adjudged. The other being asserted. — *lb.*

4. A description by an applicant for a patent of a machine, in which he sets forth his invention to be for a combination of machinery, not giving notice that he claims any part as new, is a dedication of that part to the public. — *Batten v. Taggart.*

5. After such part has passed into public use, the dedication cannot be revoked by surrender and re-issue of the patent, nor otherwise; neither the 13th section of the act of 1836, nor the 7th section of the act of 1837, relating to amending of patents, authorizing a new patent for an invention different from that originally patented. — *lb.* See *Equity.*

Payment. See *Equity.*

Pleading. See *Equity.*

Practice. — 1. Although there is an act of Congress which allows subpoenas *ad testificandum* to run from the Circuit Courts into districts not their own, yet where the witness who has been thus subpoenaed, shows no disposition to treat the process of the Court with contempt, the issuing of an attachment is always matter of discretion with the Court. And where it would be oppressive, or dangerous to the health of the witness, or where any strong reason of business or family exists against his compulsory absence from home, the court will not compel his attendance, but will either postpone the cause, or have his deposition taken. — *Ex parte Bebees.*

See *Habeas Corpus* — *Jurisdiction.*

Registry of Ship. See *Evidence.*

Release of Lien. — Under the Pennsylvania statute of June 13, 1836, giving to mechanics a lien for work done to vessels, the lien is not necessarily discharged by the party's taking a note, and giving a receipt in full. Such receipt may be explained by showing negatively, that there was no contract or contemplation to discharge the lien; and by showing positively, by even slight facts, a different purpose which induced the transaction. — *Sutton v. The Albatross.*

Salvage. — The officers and crew of a foreign vessel of war are entitled to salvage in causes, civil and maritime, as other vessels are. Application of the principle of salvage to particular facts, and amount of salvage fixed in them. — *Robson v. The Huntress.*

Shipping. See *Agency.*

Statutes. See *Fugitive Slave Law.*

Subpoena. See *Practice.*

Terms of Law. — Their meaning when settled, cannot be shown by extrinsic evidence, not to have been rightly understood, or rightly used, nor to give to them an effect which a testator employing them is said to have intended; that effect being contrary to the one given by their legal meaning. — *Aspden's Estate.*

Treason. — 1. To constitute the offence of treason against the United States, there must be a conspiracy to resist generally and publicly by force — and an actual resistance by force or by intimidation of numbers — a law of the United States. — *United States v. Hanway.*

2. A conspiracy to resist by force the execution of such law in particular instances only; — a conspiracy for a personal or private, as distinguished from a public and national purpose, is not treason: however great the violence, or force or numbers of the conspirators may be. — *lb.*

3. The general law of treason stated in a charge to the grand jury.

*See Evidence.**Witness. See Practice — Evidence.*SELECTIONS FROM THE FIRST PART OF 1 GRAY (MASS. REP.)¹

IN PRESS.

Abandonment. — Evidence. — Insurance. When a vessel arrives at the port of destination damaged by perils insured against, to an amount less than half her valuation in the policy — deducting from the requisite repairs one third new for old, and is sold by the master in the presence of the owners, because of the impossibility of obtaining the funds necessary to repair her, the owners are not entitled to abandon her to the underwriters and recover as for a total loss.

In an action on a policy of insurance on a vessel which has been sold at her port of destination by the master, solely because of his inability to obtain funds to repair the damage occasioned to the vessel by the perils insured against; evidence that it would have been dangerous and impracticable to repair the vessel at that port is immaterial and therefore inadmissible.

It seems, that an abandonment of a vessel to the underwriters without discharging the lien thereon, created by a bottomry bond, is invalid if the owners had an opportunity to discharge such lien. — *Edward C. Allen v. Com. Ins. Co. of Nantucket. Philip H. Folger v. Same.*

Action for goods feloniously taken — Money had and received — Burden of Proof — Evidence — Practice — Jury. The doctrine of the English law, that for goods feloniously taken no action lies against the felon, before the institution of criminal proceedings against him, is not in force in this Commonwealth.

Under a count for money had and received, money fraudulently taken from the plaintiff by the defendant may be recovered, though not designated as such in the plaintiff's specification of claim, if no objection be made on that ground by the defendant, until after all the evidence in the case has been introduced.

On the trial of an action, brought by a principal against his agent to recover money received by the defendant from sales of the plaintiff's property, an instruction to the jury that, if they are satisfied that the defendant sold the plaintiff's property and received the money therefor, he is bound to account for the same, is not open to the objection that, on proof of the sale and of the receipt of the money, it throws the burden of proof upon the defendant to show that the property sold was not the property of the plaintiff.

On the trial of an action brought by a principal against an agent, who had charge of certain business of the principal for many years, to recover money received by the defendant from clandestine sales of property of the plaintiff, and money of the plaintiff fraudulently taken by the defendant, evidence that the defendant, at the time of entering the plaintiff's service, was insolvent, and that he had since received only a limited salary and some small additional compensation, and that subsequent to the time of his alleged misdoings, and during the period specified in the writ, he was the owner of a large property, far exceeding the aggregate of all his salary and receipts while in the plaintiff's service, is admissible, as having some tendency to prove, if the jury are satisfied by other evidence that money had been taken from the plaintiff by some one in his employ, that the de-

¹ The greater part of the cases in this part of Mr. Gray's first volume have already appeared in our pages, more or less at length. We are not aware that we have now omitted any of the remainder.

fendant is the guilty party. And the declarations of the defendant, concerning his property and business transactions, made to third persons, in the absence of the plaintiff or his agents, are inadmissible to rebut such evidence.

On the trial of an action, brought by a corporation against one of their agents, to recover money fraudulently taken from them by the defendant, when the successor of the defendant in the same office has been called as a witness, and is sought to be impeached on the ground that he committed the acts with which the defendant is charged, evidence that money had been taken from the office while the defendant was employed there, prior to the time embraced in the plaintiff's specification of claim, is admissible for the purpose of sustaining the credit of the witness.

When books and documents introduced in evidence at a trial are multifarious and voluminous, and of such a character as to render it difficult for the jury to comprehend material facts, without schedules containing abstracts thereof, it is within the discretion of the presiding judge, to admit such schedules, verified by the testimony of the person by whom they were prepared, allowing the adverse party an opportunity to examine them before the case is committed to the jury.

Declarations, relating to the subject matter of a suit, made by a third person, in the presence of a party to the suit, and to which such party had an opportunity to reply, but did not, are admissible in evidence against him. And such evidence cannot be controlled by proof of different declarations subsequently made by the same person (who died before the trial) to others.

An agent of a corporation, who, on the trial of an action brought against him by the corporation to recover money of the corporation alleged to have been fraudulently taken by him, has expressly admitted the general carefulness and accuracy of the plaintiff's cashier, called as a witness by them, cannot take exceptions to the refusal of the presiding judge to allow him, at a subsequent stage of the trial, to prove an inaccuracy of said cashier in regard to a particular entry, in no way bearing upon the case, except as affecting the cashier's general carefulness and accuracy.

Affidavits of jurors cannot be received to prove misconduct in the jury room. — *Boston and Worcester Railroad Corporation v. Amos W. Dana.*

Common Carrier — Negligence. A consignee of goods arriving by railroad, sent to the depot of the railroad corporation a teamster, who knew the place to which the goods were to go, but did not know the marks of the bales. The teamster demanded the goods of the freight agent of the corporation, who, after a superficial examination, said that the goods had already been delivered, and were not there. The teamster pointed out some bales, and asked if those were not the goods, as in fact they were. The freight agent turned over one of the bales so as to exhibit the marks, and said those were not the goods, but came from another place. And the teamster went away without the goods. *Held*, that the agent of the railroad corporation was guilty of negligence in not delivering the goods; and the goods being destroyed by accidental fire during the following night, that the corporation were responsible for their value. — *Nathaniel Stevens v. Boston and Maine Railroad.*

Contract — Action — Patent. B. covenanted under seal as follows: "To pay A. the sum of five hundred dollars for the grant of a patent right for building and using a floating dry dock. And for every and each such floating dry dock as may be built or used by B. the sum of \$500 shall be paid as aforesaid to A., which sum or sums shall be invested in the capital stocks of the aforesaid docks. B. to pay A. the profits arising from the

use of all such dry docks, proportionally on all such shares as may be held by A., quarter yearly." B. built a floating dry dock, at a cost of four thousand five hundred dollars, and paid A. one ninth part of the profits of its use for some time, and then refused to continue to make such payments because the patent was void; but continued in the undisturbed enjoyment of the patent until after its expiration; and by holding it up as valid, prevented others from interfering with his sole use thereof. *Held*, that A. was the owner of one-ninth part of the dock built by B. and entitled to his share of the profits of its use, even after the expiration of the patent; and that the invalidity of the patent was no defence to an action brought by him against B. for the unpaid balance of such share. — *Bradbury C. Bartlett v. Samuel F. Holbrook*.

Devise. — In this commonwealth, as by the common law, a devise to A. and the heirs of his body and to their assigns forever, gives an estate tail to A. which descends to his oldest son, and to the oldest son of such oldest son. — *Raddai Wight and Wife v. Rufus Thayer*.

Evidence — Contract. H. agreed in writing "to slate the other building, about to be built at South Boston, for the new iron works, by G. and others, on the same terms he did the first building." The written contract, specifying the work to be done on the first building, and the prices to be paid therefor, was between H. and the B. I. Co. of which G. was treasurer. Before H. thus agreed to slate "the other building," G., who owned the new iron works at South Boston, had sold them to the M. I. Co., in which he was a stockholder, pursuant to an agreement to that effect made with the other stockholders before that corporation was organized. *Held*, in an action brought by H. against the B. I. Co. to recover for slating the second building, that extrinsic evidence was admissible to show who were designated by the words "G. and others" in the written agreement, and for whom and on whose account such slating was to be done. — *Roger Herring v. Boston Iron Company*.

False Imprisonment. — A sheriff, by order of the court, took a convict, sentenced to two months imprisonment, into his custody, in order to execute the sentence; the court on the same day, for the purpose of allowing the convict to be called as a witness without sending to his place of confinement, rescinded the order, and directed the sheriff not to detain him; and on the next day ordered the sheriff to execute the original sentence, which was accordingly done. *Held*, that the sheriff was not liable for false imprisonment of the convict, unless he detained him in his custody after the court directed him not to detain him, and before the convict was again ordered into his custody. — *Thomas Coffin v. Uriah Gardner*.

Husband and Wife — Marriage — Age of Consent. The age of consent in this Commonwealth, as by the common law, is twelve in females and fourteen in males; and a marriage between two infants above those ages is valid, without the consent of their parents or guardians, notwithstanding the Rev. Sts. c. 75, §§ 15, 19, which prohibit magistrates or ministers, under a penalty, from solemnizing the marriage of a female under the age of eighteen, or a male under the age of twenty-one, without the consent of the parent or guardian. — *Thomas J. Parton v. Susan Harvey*.

Insolvent Debtors — Trover. The assignees of an insolvent debtor brought a bill in equity to set aside conveyances of property made by the debtor to the defendants, as made and taken either without consideration and in fraud of creditors, or by way of unlawful preference, contrary to the insolvent laws, charging the defendants, in the common form, with combining and confederating with divers other persons to the plaintiffs unknown, and praying for relief against the defendants jointly and severally; and the court, after a hearing upon the merits, decreed that the demands, set up by the defendants in their several answers, were justly due them from the insolvent, and that the conveyances of property in payment there-

of were not made in violation of the insolvent laws, and dismissed the bill. *Held*, that this decree was a bar to an action of trover by the assignees for the same property against one of the defendants in the suit in equity.

Joint Defendants—Damages. Where all the defendants, in an action, charging them with a joint trespass, are defaulted, and the case referred to an assessor to assess the damages, they are all liable for the whole damage actually sustained by the plaintiff, although it appear by the evidence before the assessor that one of them did not participate in the trespass.

In trespass for taking and carrying away sheep, the measure of damages is the market value of the sheep, and not their value to the plaintiff. — *Edward W. Gardner v. Thomas B. Field*.

Landlord and Tenant—Pleading—Estoppel. The assignee of all a lessee's "interest in and to the lease" may recover rent, subsequently accruing, of one to whom such lessee has previously leased a portion of the demised premises for the whole term, and who occupies such portion accordingly, in an action of contract, without setting forth in his declaration the assignment from the original lessee to the defendant. And the defendant in such action is estopped to deny the estate of the original lessor in the premises. — *George F. Patten v. Daniel Deshon*.

Landlord and Tenant—Apportionment of Rent—Estoppel. The assignee of a lease who enters upon and occupies the premises is estopped in an action for rent brought against him by the original lessor, to deny the validity of the assignment from the original lessee to him, and is liable for the rent during the whole term, although he leaves the premises before the expiration thereof.

On a trial of an action brought by a lessor against his lessee for a quarter's rent, there was evidence that the lessee, before the expiration of the quarter, left the premises, and authorized the plaintiff to enter, and fit them for a new tenant; the judge instructed the jury that, in case they found a contract to apportion the rent, they might apportion it accordingly; and the jury returned a verdict for the plaintiff for a portion of the quarter's rent. *Held*, that the defendant had no ground of exception to this instruction. — *Edward Blake v. Albert Sanderson*.

Limitations, Statute of. — Under Rev. Sts. c. 120, § 4, as well as under St. 1786, c. 52, § 5, the purchaser of a witnessed promissory note may maintain an action thereon, for his own use, in the name of the original payee, after the expiration of six years from the time when the cause of action accrues. — *Aaron W. Rockwood v. Joseph B. Brown*.

Mortgage of personal Property—Action—Demand. A demand of payment of the money due him, made by the mortgagee of goods, upon an officer attaching them together with other goods of the mortgagor, need not specify which of the goods are included in the mortgage.

A mortgagee of goods, attached together with other goods of the mortgagor, with which they are intermingled, on demanding payment of the attaching officer, as required by Rev. Sts. c. 90, § 79, may maintain an action against him, without pointing out the articles included in his mortgage.

A demand of payment, made by a mortgagee of goods attached, on the attaching officer, is not rendered invalid by including in it articles not covered by the mortgage. — *Charles S. Averill v. Francis O. Irish*.

Practice—Evidence—Witness—Insanity. On the trial of a criminal case, when the defence relied on is the insanity of the defendant, neither books of established reputation on the subject of insanity, whether written by medical men or lawyers, nor statistics of the causes of insanity, as stated by the court or counsel on the trial of another case, can be read to the jury.

A witness, not an expert, who has testified to the appearance and con-

versation at certain interviews, of a person whose insanity is sought to be established, cannot be asked what opinion he formed at the time of those interviews, of that person's mental condition.

On the trial of an indictment for murder, where the defence relied on it, that the homicide was committed by the defendant under an insane delusion that the deceased and others were engaged in a conspiracy against him, expressions of hostile feelings towards the defendant, made by the deceased, though not shown to have been made in the defendant's presence, nor to have come to his knowledge are admissible evidence to show the state of mind of the deceased towards the defendant at that time, and as thus tending to show some real ground for the defendant's feelings toward the deceased.

A witness who has been asked on a cross-examination, when he was first inquired of by any one concerning the facts to which he has testified in chief, may be asked on re-examination whether he had previously communicated the same facts to other persons. — *Commonwealth v. Wilson*

Railroad — Location of Road — Quo warranto — Charter. By Rev. Sts. c. 39, § 73, a railroad corporation, who file the location of their road with the county commissioners within one year, as required by § 75, may after the expiration of that year, within the time prescribed by law for completing their road, vary the location of any portion of their road to any extent, provided they do not locate any part thereof without the limits prescribed by their act of incorporation; although their act of incorporation, which provides that they shall have the powers and duties set forth in Rev. Sts. c. 39, also provides that it shall be void, if their location be not filed within one year. And their power so to vary their location is not controlled or limited by the original location, as filed with the county commissioners.

A plan exhibited to the legislature by those applying for an act of incorporation as a railroad company, but not referred to in the act, is not admissible in evidence to control the construction of the provisions of the act of incorporation, as to the limits within which the road is to be located.

By St. 1850, c. 268, the Midland Railroad Company were authorized to locate and construct a railroad, "commencing at some convenient point on the Norfolk County Railroad; thence through the southerly part of Dedham; thence through or near the westerly part of the towns of Canton and Milton."

Held, that a location, commencing at a point of the Norfolk County Railroad in South Dedham, and not departing from that road at once, but running northerly upon it for more than two miles, and then approaching within two hundred rods of the northwesterly corner of Canton, and running near the westerly boundary of Milton, was authorized by the statute.

A corporation, who have been authorized to construct a railroad, and are afterwards authorized to make it in sections of five miles each, provided that they shall not commence the construction of any portion of their road within a certain distance of one of its terminations, until all the stock is subscribed for by responsible persons, and a certain portion thereof actually paid in, are not obliged to have their stock subscribed for, and the specified amount paid in, as a condition precedent to constructing their whole road, not in sections.

Whether the private right or interest, injured or put in hazard, by the exercise by any private corporation, of a franchise or privilege not conferred by law, must be a right or interest, for an injury to which some remedy previously existed in law or equity, in order to authorize an application to this court for leave to file an information in the nature of a *quo warranto* — *quare*. — *Boston and Providence Railroad Corporation v. Midland Railroad Company.*

Sale — Contract — Partnership. A. made with B. the following

agreement in writing: "Sold B. on joint account with A. two thousand boxes of candles, at twenty-six cents, six months from delivery; B. to be allowed two and a half per cent. on sales; on all sales not approved by A., B. is to guaranty the same, receiving a commission of two and a half per cent.; for one half of the sales made by B. he is to pass over the paper to A.; there are to be no charges for storage; property in store to be covered by insurance by B. for joint account and expense." A. delivered the candles to B. under this agreement, and received from time to time, as the candles were delivered, therefor, eight notes of B. payable in six months, two of which were paid by B. at maturity, and the others indorsed and negotiated by A. and afterwards paid by him, B. having become insolvent. *Held*, that these facts showed a sale of an undivided half of the candles by A. to B., and not a partnership between A. and B. with regard to the candles; and that A. therefore had no lien on B.'s half of the candles, as against B.'s assignees in insolvency. — *W. T. Hawes v. Pardon Tillinghast*.

Trustee — Deed. This court has power, under its general equity jurisdiction to enforce and regulate the execution of trusts, to allow a trustee to resign upon his own application, notwithstanding the Rev. Sts. c. 69, and St. 1843, c. 19, conferring similar powers in certain cases upon the judge of probate.

An unmarried woman conveyed her real and personal estate to E. in trust to pay over the income thereof to her during her life, and on her decease to convey the property as she should appoint; and reserved the power, except while she should be a married woman, to revoke all the trusts created by this settlement, and dispose of the property at her pleasure: And the settlement provided that the said trustee might resign at pleasure, and that the settler might nominate a new trustee, and that "said E." should transfer all the trust property to such new trustee, who should "thenceforth have and exercise all the rights and powers, and be subject to all the duties, hereby vested in or imposed upon said E." *Held*, that the power of appointment, reserved to the settler, was not exhausted by one appointment of a trustee on E.'s resignation; but that on the resignation of such new trustee, she might make another appointment, and that, if such appointee was a fit person, the court would order the trust property to be conveyed to him. — *Jonathan I. Bowditch v. Mary A. Banuelos*.

Way — Adverse Possession. The record of the laying out of the streets in South Boston, made by the selectmen of Boston, pursuant to the directions of St. 1803, c. 111, is thus: "The selectmen have determined and agreed to lay out the streets through the whole of said tract, now called South Boston, according to a plan drawn by M. W., surveyor;" "the streets agreed upon and laid out are described as follows:" among the streets so described were three "to the northward of Broadway, and parallel thereto, all of them fifty feet wide," "the street on the northern shore in Boston harbor to be called First Street," and to be two hundred and fifty feet distant from the second. First Street was laid out according to this description from the easterly part of South Boston as far westwardly as the width of the land between Broadway and the northern shore would allow. *Held*, that a section of a street drawn on the plan of M. W. along the northern shore, though only forty feet wide, and only one hundred and eighty feet distant from the second street, and though neither it, nor the corresponding part of the second street, was parallel to Broadway, followed the description in the Record sufficiently to authorize the mayor and aldermen of Boston to complete it.

The possession and fencing, for more than twenty years, by one holding no conveyance thereof, of land in South Boston, over which a street was

laid out by the selectmen under St. 1803, c. 111, but which has not been ordered to be completed, is not such an adverse possession as to affect the right of the mayor and aldermen of Boston to complete the street.

A highway may be located, without special authority of the legislature, over flats, lying between high and low water mark, which have been lawfully filled up by the proprietor of the adjoining upland. — *David Henshaw v. Thomas Hunting.*

Miscellaneous Intelligence.

WHAT IS A CRIME? — We directed the attention of our readers last week to a question of great interest and importance which had been raised, but not decided in the Court of Exchequer. It arose on the Evidence Act, which renders parties admissible as witnesses, but by the 3d clause excepts "any person who in any criminal proceeding is charged with the commission of any indictable offence, or any offence punishable on summary conviction." The present case, the *Attorney-General v. Radloff*, 23 L. T. Rep. 191, was an information for recovery of penalties for smuggling tobacco; and the question was, whether the defendant was a competent witness for or against himself. Was it a criminal proceeding in which he was charged with an indictable offence? Or was it a criminal proceeding in which he was charged with an offence punishable by summary conviction? Of the former there could be no doubt, for it was not an indictable offence; the only point remaining, therefore, was, whether the statute was to be so read, as meaning a criminal proceeding wherein the defendant was charged with an offence punishable by summary conviction? It was agreed that this was the right reading of the statute; and then came the material point, is an excise information a criminal proceeding? It will be seen that upon this question the Judges were equally divided, and the arguments by which they supported their diverse views will be found at length in the report. MARTIN, B. thought the proper meaning of crime in law was "an indictable offence," and he therefore was of opinion that the case did not come within the exception. PARKE, B. held the contrary; acceding, however, to the proposition that the statute was to be read as applying only to summary convictions in criminal proceedings. But he said "an information by the Attorney-General for an offence against the revenue laws is a criminal proceeding. It is a proceeding instituted by the Crown for the punishment of a crime against the public; for it is a crime and injury to the public to disobey the statute and revenue laws. I think a prosecution or proceeding for any offence against the public is a criminal prosecution." But surely this definition of a crime, pushed to its consequences, would entirely destroy all recognized boundaries between civil and criminal law. POLLOCK, C. B. concurred with him. "I cannot distinguish," he said, "in point of either morals or law, between the cheating the State and the cheating a private individual. I cannot distinguish between endeavoring by concealment and fraud to prevent that from being paid which is necessary for the public service, and by a similar fraud and concealment depriving one of her Majesty's subjects of that which is his lawful right and due." In morals, certainly there is no difference; but the law has, for wise purposes, chosen to distinguish between the withholding of a debt and the obtaining of money by a false pretence. It has thought fit to make it a crime to cheat your neighbor by a lie, but not a crime to cheat your creditors; and so marked is this distinction, that this very week we have seen the House of Commons

solemnly affirming a proposition to make it lawful for men to cheat their creditors. So with the revenue — the law has chosen to treat it as a *debt* due to the Crown, the non-payment of which it punishes with a penalty. In construing a statute, the words must be read in their legal sense, and "criminal proceeding" should be construed as a proceeding for something which is "a crime" in law; and the test of "a crime" in law we take to be, if it is an indictable offence, either at common law, or made such by statute. PLATT, B., who sided with Martin, B., thus viewed the question: "What is the meaning of a civil action as contradistinguished from a criminal proceeding? It strikes me that the true test is this. If the subject-matter be of a personal character, that is to say, either of goods or property to be recovered by means of the proceeding, that then becomes a civil proceeding; but if the proceeding is one which may affect the defendant personally at once, by the imprisonment of his body, in the event of a verdict of guilty being pronounced against him, without more, he is liable as a public offender. That is what I consider to be a 'criminal proceeding.'" This is an ingenious definition, but not strictly accurate, for it constitutes as the test of crime the legal consequence; and its imperfection is shown by this, that there are many summary convictions for offences clearly criminal in their nature that are not punishable by imprisonment "on a verdict of guilty, without more;" and, on the other hand, there are some offences not criminal which are punishable by imprisonment.

Thus stands this very curious and interesting question. Perhaps it will astonish some of our readers to find that on a point apparently so simple and elementary as "What is a crime?" which stands, as it were, at the very threshold of the law, four learned Judges should be equally divided in opinion. It proves the correctness of an assertion we have often ventured in these columns, that sufficient attention is not given, either by the makers or the administrators of our law, to the province of jurisprudence: by which we mean the proper boundaries of law — what are the rightful subjects of legislation, and what are not — and what acts or neglects belong properly to civil, and what to criminal law. Certainly, before we attempt criminal codification or legislation, we ought to come to some clear understanding of the question "What is a crime?" on which at present, there is a manifest conflict among the most skilful lawyers.

One view of the particular question that has occasioned this curious and interesting discussion does not appear to have presented itself to either of the Judges. Knowingly to disobey a statute, with intent to break or evade the law, is in itself an indictable offence, and therefore "a crime." Might it not be said that a proceeding to punish that offence by information for a penalty is a charge for an indictable offence, punishable on summary conviction, and therefore a criminal proceeding? At all events, so serious a doubt should be removed by the Legislature; and the difficulty might be removed by half-a-dozen words in the Common Law Procedure Bill. — *Law Times*.

See May Law Rep., 1854. Notes to Leading Criminal Cases, *Rex v. Wheatly*.

WITCHCRAFT AND SORCERY AMONG THE PUEBLO INDIANS. — Santa Fe papers of April 29th have an interesting account of a trial before the U. States District Court for the Territory of New Mexico, in which four Pueblo Indians were charged with having murdered two others, accused of witchcraft and sorcery. The *Gazette* says:

"The case presents the most singular state of facts that could be imagined, and will be considered by our readers in the United States as something both new and strange. The offence for which the two deceased, Romero and Tafallo, were put to death, was that of witchcraft and

sorcery. They were shot by the defendant named in the indictment, with a gun, a short distance beyond the borders of the Pueblo. Who would have imagined that the scenes of the early days of Salem would be re-enacted in the middle of the nineteenth century, and that, too, among a class of people hardly one step more civilized than the savage.

That our readers may further understand this singular case, we will say a word or two in regard to the Pueblo Indians.

They are a class of people who are supposed to have been originally wild and savage, like the other tribes of the territory, but were converted to Catholicism, in the early days of the Spaniards, when they first occupied this country. They were then gathered into small villages, and so have always remained, up to the present time, scattered throughout the length and breadth of the country. For all local purposes they have been recognized as distinct communities, and are a quiet and harmless race of people. They elect their own officers, but are not taxed, nor enjoy any of the rights nor bear any of the burdens of citizens. They retain their primitive dress of skins, and in general appearance differ but little from the wild Indians of the plains and mountains.

Such, in brief, are this singular people, who put four of their number to death for the supposed crime of witchcraft. They profess the Catholic religion, but are wretchedly ignorant and superstitious. Many have supposed them wholly independent of the laws of the United States and this territory, but this point, when made by the defence on the trial, was not listened to by the court, which decided that all persons within the limits of the territory were alike subject to the criminal laws of the country. This is an important point settled, as regards the Pueblo Indians, and henceforward they will be sensible of the fact that they cannot commit crimes without being liable to punishment.

The Nambe Indians were as much frightened as though they had been found guilty, and the trial will serve the same purpose as though they had been punished with death or imprisonment; and we venture to say that in future, no more witches will be killed in Nambe. Although the act of the killing was sufficiently proved to the jury, there was no evidence that it was done in the county of Santa Fe, without which they could not find them guilty. The trial was conducted in three languages — English, Spanish, and the dialect of Nambe — and during its continuance a deep interest was manifested."

ANECDOTE OF LORD TENTERDEN. — In a speech at Sherborne, Mr. Macready related the following anecdote: — "The first time I visited Canterbury I wished of course to see the Cathedral. A gentleman there of the name of Austin, the surveyor and architect of the building, hearing of my intention, and being desirous of showing me civility, proposed to accompany me. This person had re-decorated almost the whole of the interior, had restored the dilapidated portion of the western front, had built himself an excellent house in the cathedral grounds, and was at the time I speak of, in the enjoyment of a very comfortable income, and a most respectable position. He was the artificer of his own fortune, and had raised himself to this position from a state almost of actual destitution; he had formerly been the servant of a friend of mine, and when he reached Canterbury had not half-a-crown in his pocket. He directed my attention to everything worthy of notice; pointed out with the detective eye of taste the more recondite excellences of art throughout the building, and with convincing accuracy, shed light on historical traditions associated with it. It was opposite the western front that he stood with me before what seemed the site of a small shed or stall, then unoccupied, and said, 'Upon this spot a little barber's shop used to stand. The last time Lord Tenterden came down here, he brought his son with him, and it was my duty, of course, to at-

tend them over the Cathedral. When we came to this side of it, he led his son up to this very spot, and said to him, 'Charles, you see this little shop; I have brought you here on purpose to show it to you. In that shop your grandfather used to shave for a penny! That is the proudest reflection of my life! While you live never forget that, my dear Charles!'" And this man, the son of a poor barber, was the Lord Chief Justice of England.—*Law Times*.

M. BERRYER.—What M. Berryer had to say to young lawyers in Paris, may interest those of America. The *Gazette des Tribunaux* gives the following report of the principal passages of an address by him as "batonnier" before the "Conference des Avocats"—

"Gentlemen," said he, "I will not pronounce the final adjournment of this year's debates, without expressing to you the happiness I have enjoyed in my intercourse with you. Now approaching the end of my career; having been called by the suffrages of my aged brethren to perform the functions of senior advocate, I can say with truth that I have seen with great satisfaction, what the bar may expect from the young generation over whose labors I have presided.

Of all professions, that of the advocate is the most elevated and dignified. Do not suffer yourself to be discouraged by the difficulties which present themselves to you on your entrance into it. Persevere, and you will succeed. I desire to forewarn and forearm you against an unfortunate tendency of our times. We know not how to await what the future may bring; we desert the liberal professions, in which the first steps are difficult and disagreeable, and seek an office or employment which may secure a fixed and certain remuneration. We sacrifice the future to the present.

Retreat not before the difficulties of our profession. Elevated and noble, indeed, it is. If it should adorn itself with this youthful band which I see before me, it would advance still higher in honor and dignity.

It is not a slight advantage to belong to a profession which confers no rank; which recognizes no profession superior to itself; and which looks down on none as inferior, for it stretches forth its hand to all the unfortunate and wretched.

Permit me to counsel you in regard to the exercise of this profession. Apply yourselves constantly to the study of every cause which shall be confided to your management, with the same industry and earnestness that you have devoted to the study of the questions which you have discussed here. When an advocate has thoroughly and deeply examined a cause that he has been employed in, and has undertaken to plead, he acquires easily an appropriate style, and avoids that vulgarity of speech which derogates from the dignity of the advocate and of the audience.

Avoid a tendency, or a habit, which did not exist when I entered the bar, but has grown on the profession during the last fifteen years.

Now, in almost all cases, an advocate pleads summarily, as if he were merely reporting a case. You ought, even in the clearest and most simple causes, to maintain the dignity of the gown; and you will thus gain for yourself and the profession, the respect of the magistrate and of the public. You ought not to present to the Tribunals disconnected and immethodical statements; that is not arguing a case. The smallest matter, that becomes the subject of contest in courts, requires to be studied and treated methodically and with care.

These are the counsels of one who has long been a member of the profession; of an aged advocate, who never desired to quit it to enter any other career, and who, in spite of the attractions of the tribune, which I regret a little, I confess, has always preferred to continue an advocate.

I know not whether it will be allowed to me to continue much longer in the exercise of the profession ; but I shall forever preserve the remembrance of the two years which I have passed among you ; and I shall always receive with delight the visits of my young associates, over whose labors I have presided, whose estimable qualities I have appreciated, and each of whom, I trust, will contribute his share of glory to the bar."

A FRENCH JUDGMENT IN AN ACTION FOR LIBEL.—During the years 1852 and 1853, M. Philarete Chasles published in a Russian journal, the *Gazette of St. Petersburg*, a series of letters, in which M. Buloz, chief editor of the *Revue des Deux Mondes*, and M. de Mars, director of that review, discovered attacks on the works which they conducted, of such a nature as to do them material injury. They therefore summoned M. Philarete Chasles before the 4th chamber of the civil tribunal of the Seine, laying their damages at 20,000 francs. The tribunal rendered the following judgment :—

Whereas Buloz and de Mars demand against Philarete Chasles, reparation for the damage which they declare they have suffered by the publication, at St. Petersburg, of thirty-four letters, composed by Philarete Chasles, and translated from the French into the Russian language, in which several passages are found wherein Buloz and the *Revue des Deux Mondes* are expressly mentioned, or referred to with sufficient certainty ;

Whereas the plaintiffs do not expressly declare that they have been defamed, and it appears that the passages marked do not import defamation, as there is not perceived in them any allegation or imputation of any actual fact ;

Whereas, if it is true that the passages marked by the plaintiffs contain severe expressions which the tribunal might regret to find in a publication made at a distance from, and without the knowledge of, the persons attacked, nevertheless it does not appear that they have caused any damage to either of the plaintiffs ;

Whereas, a small number only of passages are marked, in a publication of considerable extent, and it is only by placing them side by side, and explaining some of them by others, that the conclusion can be arrived at that a passage in which Buloz is named, discloses that he was meant in a passage published a long time before, in which he was not named ; and clearly and from the admission of Buloz, many of the passages marked by himself do not refer to him ;

Whereas the liberty which, at all times, has been granted to satirical writers, excuses to a certain extent, what in a work of a character more serious, more positive, and in which the imagination plays no part, might be properly judged with more severity ;

Whereas, besides, the publication was not made in France, and appeared only in a language but very little known there, so that for Russian readers, for whom it was exclusively designed, it had not, at least with any effect, the character of personality which it would have had for French readers ; and if, under the circumstances, the reputation of Buloz may have received a slight injury, he may find in this judgment a just reparation, and the only one he has a right to demand ;

Whereas, it has not been proved by de Mars, that the passages which he has marked, have injured the sale of his review in Russia ;

Whereas, moreover, the publication is entirely discontinued ;

Therefore, for these "*motifs*,"

We condemn Philarete Chasles to pay the costs of the plaintiff, to stand instead of damages. — *Gazette des Tribunaux*.

VIOLATION OF THE GRAVE.—Two inhabitants of a little village of Sologne have been brought before the tribunal of Romorantin, for a crime

exceedingly rare in criminal annals, and which originated in the grossest superstition.

One was accused of the violation of the grave, and seated at his side was another, imbecile and sad in look, the grave digger of the commune of Mur, accused as an accomplice. The former had been pointed at, for some time, by public rumor, as having, in the night, exhumed the head of a man, who had been several years buried, and secretly carried into his house and there concealed these human remains.

The first rumor was sufficient to produce an extraordinary excitement among the people; but details were added which caused horror in some, and incredulity in others. It was said that the accused had been in earnest pursuit, for several weeks, of a human head; and to procure it had in vain solicited the grave digger of Romorantin, then that of a neighboring commune, but at length the grave digger of Mur, pointed out a grave where he obtained the head he so much desired. Rumor even added that he had subjected these remains to a sort of preparation, and having boiled them, had made his young child drink of the horrible decoction.

However strange were these details, they were, nevertheless, true, and true in every point, for the accused, who had not, nevertheless, the figure of a vampire, but rather that of a poor besotted peasant, related them himself to the audience.

He attributed this act, to which we can give no name, to the belief instilled into his mind by two beggars, that by giving to his son this abominable beverage, he would cure him of attacks of epilepsy, to which he had been subject for several years. He said that nothing but the force of paternal love could have determined him to surmount the fear he felt in going, in the darkness, into the cemetery, and digging six feet below the surface, for the head of a dead man, which he was obliged to break and tear from the trunk to which it still adhered. He added, that it was well for him that he did it, for since then the epileptic attacks had ceased.

The Tribunal, feeling sympathy for the paternal affection of the wretched man, and commiseration for his superstitious notions, sentenced him and his accomplice to only three days imprisonment. — *Ibid.*

CONFLICT OF LAWS. — DISTRIBUTION OF PERSONAL PROPERTY. — By the laws of France, the property of a resident, leaving no direct heirs, but brothers and sisters only, is to be distributed among them; by the laws of Russia among the brothers only. Prince Galitzin, a Russian, but residing, though not domiciliated, in France, died in that country, leaving several sisters married and domiciliated there, and several brothers who continued to reside in Russia; and also personal property, consisting of money, clothes, furniture and certificates of foreign stock deposited with a Paris banker. The brothers claimed the whole; the sisters claimed an equal share with the brothers. The court decreed that the administrator should hold all the aforesaid property in France for the sisters, until it should be ascertained to what sum their shares in the whole estate amounted, according to the laws of France; and if the property in France should be found not to exceed in value their shares, he should pay or deliver to them the whole of it; if it did exceed, the excess should be paid over to the person or persons entitled to receive it in Russia. — *Ibid.*

Notice of New Book.

SUPPLEMENT TO THE REVISED STATUTES. Being the General Laws of the Commonwealth of Massachusetts. Session, 1854. Prepared and Edited by Horace Gray, Jr. Boston. Dutton & Wentworth, publishers.

pp. 99. With an Appendix containing the Articles of Amendment to the Constitution of Massachusetts, agreed to by the Legislature of 1854.

This edition of the laws is almost a necessity for the practising lawyer in Massachusetts. We made the Statutes contained in the present number the subject of some gentle animadversion in a recent article, (*See Law Reporter* for June, 1854,) and we recommend the Legislature to refer bills in future to Messrs. Dutton & Wentworth before they are passed to be enacted.

Insolvents in Massachusetts.

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Commissioner.
Averell, Reuben C. ¹	Roxbury,	Sept. 9, 1854.	Samuel B. Noyes.
Baldwin, Thomas C.	Newton,	July 17,	Charles Demond.
Balloe, Willard H.	Pelham,	Aug. 12,	I. F. Conkey.
Beal, John F.	Stoughton,	" 22,	Samuel B. Noyes.
Beal, Randall B.	Abington,	" 12,	Welcome Young.
Butler, John R.	Boston,	" 14,	Charles Demond.
Carver, Lowell	Lowell,	" 22,	Isaac S. Morse.
Chamberlain, Andrew L.	Boston,	" 19,	John P. Putnam.
Clarke, James W.	Roxbury,	Sept. 8,	Samuel B. Noyes.
Crawford, John	Oakham,	Aug. 24,	Alexander H. Bullock.
Cushing, John	Chelsea,	" 18,	John P. Putnam.
Deshon, Daniel Jr.	Boston,	" 17,	John P. Putnam.
Dickerson, Royal D.	Florida,	" 22,	Lorenzo H. Gamwell.
Dunlap, Delos A.	East Bridgewater,	" 9,	Welcome Young.
Emery, Alonzo	Boston,	" 23,	John P. Putnam.
Fairbanks, Daniel G.	Grafton,	" 31,	Alexander H. Bullock.
Fisher, John B.	Canton,	Sept. 6,	Samuel B. Noyes.
Flanders, Isaac E.	Charlestown,	June 14,	Josiah Rutter.
Frary, Thomas	Greenfield,	Aug. 12,	David Aiken.
Fricke, Charles	Boston,	May 17,	Charles Demond.
Gardiner, Stephen H.	Lynn,	Aug. 7,	John G. King.
Goddard, Samuel	Worcester,	" 22,	Alexander H. Bullock.
Goodhue, John	Salem,	" 22,	John G. King.
Hale, Nathan	Boston,	" 14,	John P. Putnam.
Henderson, Walter A.	Boston,	" 9,	John P. Putnam.
Huntley, Russell	Charlestown,	" 9,	Isaac S. Morse.
Johnson, Moses S. ²	Sutton,	" 30,	Alexander H. Bullock.
Johnson, Ploy F. }			
Jones, William	Randolph,	" 10,	Samuel B. Noyes.
Knapp, Anthony	Boston,	" 19,	John P. Putnam.
Lyon, Joseph	Boston,	" 8,	John P. Putnam.
Mattapan Iron Company,	Boston,	" 25,	John M. Williams.
Mayall, Miles	Roxbury,	" 23,	Samuel B. Noyes.
McCloskey, Francis	Millbury,	" 11,	Alexander H. Bullock.
McKenree, Michael	Waltham,	July 15,	Josiah Rutter.
McKenzie, John	Waltham,	" 8,	Josiah Rutter.
Merrill, Lewis Jr.	Cambridge,	June 8,	Josiah Rutter.
Messer, Willard L. ¹	Roxbury,	Sept. 9,	Samuel B. Noyes.
Morse, Elbridge G.	Boston,	June 17,	Charles Demond.
Nichols, Daniel F.	Salem,	Aug. 23,	John G. King.
Nott, Samuel	Boston,	" 21,	John M. Williams.
Otis, Elijah	Boston,	" 17,	Welcome Young.
Pinkham, James L.	Scituate,	" 18,	John P. Putnam.
Prescott, Chase	Boston,	" 10,	Isaac S. Morse.
Riley, Michael G.	Lowell,	" 22,	Charles Demond.
Sloan, Robert M.	Boston,	July 1,	Josiah Rutter.
Smith, Geo. A. & Lyman G.	Cambridge,	Aug. 22,	Charles Demond.
Snow, James	Boston,	" 18,	Alexander H. Bullock.
Snow, Levi E.	West Brookfield,	" 31,	John P. Putnam.
Spear, Simeon C.	Boston,	" 12,	Samuel B. Noyes.
Taylor, Mary	Sharon,	July 1,	Charles Demond.
White, Rodolphus	Boston,	Aug. 11,	David Aiken.
Wilkinson, Wm. N.	Shelburne,	" 18,	Asa F. Lawrence.
Williams, Avery	Melrose,	" 18,	Lorenzo H. Gamwell.
Withington, Alpheus M.	Pittsfield,	As of Aug. 8,	Francis Hilliard.
	Plymouth, having usual place of business in Roxbury.	Aug. 14,	

¹ Messer & Averell.

² M. S. J. & Co.

THE

MONTHLY LAW REPORTER.

NOVEMBER, 1854.

THE CHIEF JUSTICES OF THE UNITED STATES.¹

THIS is the first attempt that we know of in this country, to follow the plan of Lord Campbell in writing the lives of the Lord Chancellors and Chief Justices of England. Taking into consideration the brief period of time, not exceeding the term of a single life, and the comparatively scanty resources of the American author, we think he has produced a book interesting in itself and creditable to his industry and judgment in the selection and arrangement of his materials. Though we have not that long succession of events extending over a period of nearly eight hundred years, from which the English author could compile his work, yet to an American, at least, there is no period of equal length in history since the Conquest — history too, belonging both to England and America — so interesting or so important as that which commences at or shortly before the era of the formation of the existing government of the United States.

It is true that many of the events of our early history as a nation, have but little connection with the judicial history of the nation. They belong rather to the Cabinet, the Congress, and the Field ; but in these events, in conducting the struggle with Great Britain, in forming the Constitution and in giving an impress to our institutions, the men who were afterwards called to administer the judicial system of the

¹ Sketches of the Lives and Judicial Services of the Chief-Justices of the Supreme Court of the United States. By George Van Santvoord. New York : Charles Scribner, 145 Nassau Street. 1854.

United States, acted prominent and distinguished parts. All those of the Chief Justices of the United States who have passed away, were born early enough to enact their part and make their mark in the formation and direction of the government.

It was well that the early direction of our destinies was in such hands. We think it must strongly impress any earnest student of that period of our history, immediately subsequent to the peace of 1783, down to the acceptance of the Constitution, that that acceptance or that any harmonious plan of union for the liberated colonies, was one of the most improbable events that could have been anticipated. The jarring interests of the North and South were to be reconciled, and the inequalities of opinion with regard to the extent to which the democratic principle should be adopted were to be brought to a level. It seems to us that never was a national birth surrounded with so many dangers; that never were the passions, the opinions, and the conflicting interests of men so providentially guided and overruled for ultimate good, as they were in that day of peril and of trial.

If the same jealous exasperation on the subject of slavery as now exists, had then sprung up, it is manifest that a harmonious union or any union would have been impossible, and it seems to us to be equally true, that if the union were now to be formed, the prevalence of the democratic spirit and of democratic passions would be an insuperable obstacle to its adoption. The very feebleness of the confederated States, their scanty population, their exhausted strength, their low estimation in Europe, and the fear of the contagion of their example, all appearing as they did at the time as the harbingers of ruin, were in fact the causes of our ultimate success and safety; for our individual weakness and the danger arising from foreign hostility, the pressure from without, were among the principal causes which repressed the working of our internal jealousies, and compelled us to lay aside our fears of each other, and unite in repelling or guarding against the common danger which impended over all of us, from the disaffection of foreign nations to our cause and their contempt of our weakness.

But the main cause of our success in obtaining the adoption of the Constitution or of any constitution, was the character which the revolutionary contest had impressed upon the people of the colonies, and more especially upon their great leaders and advisers.

There never probably existed in human history a people so pure, so single-minded, and at the same time so well informed, as were the people of the United States at the time when the Peace of Paris left them connected together by that rope of sand, — the old confederation. They had been made perfect through suffering. On the part of Great Britain, the war had been carried on in a spirit of savage exasperation. We were rebels, we were colonists, long believed, according to the theory of Buffon, to have degenerated in these western wilds from the parent European stock, and unworthy both by our character as rebels, and by our position in the scale of humanity, of the courtesies and forbearance exercised by nation towards nation in the conduct of civilized warfare. There was scarce a family, from which a husband, a son, or a brother, had not been drafted for service in the field. There was no State whose resources had not been exhausted by taxation and requisition, and in the track of the British armies as in that of Attila the Scourge of God, the grass had ceased to grow. The opportunities for individual enterprise were so scanty, the minds of men had become so national in presence of the all-absorbing interest of the mortal struggle for independent existence, that private and selfish interests seem to have been forgotten or laid aside as hopeless, and all hearts and all efforts concentrated upon the national contest. The consequence was that they came victorious out of the struggle, bankrupt in private fortunes, but anxiously hopeful for the future, with minds elevated and purified and strengthened by the trial, and with the firm and self-denying purpose, first to settle and to form the nation, and to make national prosperity the groundwork for whatever of individual success they might afterwards obtain. When such were the feelings of the mass of the people, it may well be supposed that their leaders could not have been behind them in patriotic self-denial. Washington's services throughout the Revolution, as afterwards during the eight years of his presidency, were without any other reward than the consciousness of duty well done, and the other lesser luminaries of the age, following the example of their revered chief, were actuated by the same spirit.

Among these men, either in the field or in the council, were the future Chief Justices of the United States — Jay, Rutledge, Ellsworth, and Marshall. We do not propose, in the brief limits of such an article as can be admitted to the

pages of this journal, to enter upon the biography of these men, or of their present honored successor. We refer our readers for this to the book itself. We only hope to call attention to the subject, and to notice cursorily some few thoughts that have struck our attention in glancing over the volume.

JOHN JAY was a federalist of the old school. He was not a member of the convention that adopted the Constitution, but he was earnest in its support, and was the author of a few of the papers of the "Federalist," the remainder and the largest part of which is from the pens of Hamilton and Madison. It was the influence of the federal party that secured the adoption of the Constitution, with whatever tendency it possesses towards centralization, and towards strengthening the hands of the general government at the expense of those of the States. It is well for us that so much strength has been secured to this government as to make it effective for all practical purposes. It is perhaps quite as well, that a strong democratic opposition, assuming the guardianship of State Rights, prevented the ultra federalists from carrying their theories of centralization any farther. Hamilton was in favor of a Senate and Executive for life, and Jay, in a letter to John Adams, expressed his desire "to see the people of America become one nation in every respect; for, as to the separate legislatures, I would have them considered, with relation to the confederacy, in the same light in which counties stand to the State of which they are parts, viz., merely as districts to facilitate the purposes of domestic order and good government."

The same spirit is shown in his remarks, in delivering his opinion as Chief Justice in the Supreme Court of the United States, in the memorable case of *Chisholm v. Georgia*, 2 Dallas, 472, 473, in which he seems to keep entirely out of sight the existence of sovereignty as appertaining to an individual State, and to consider the *State* of Delaware as of no higher dignity than the city of Philadelphia, merely because the former had no more inhabitants than the latter.

There are but few statesmen now among us who will agree with the extreme views of the primitive federalists — and we believe that it was fortunate for the destiny of this country that the democratic party succeeded in preventing those views from being carried any farther.

We cannot say that we think that the opinion of Chief Justice Jay, in this case, is a very sound one, and it has certainly been fortunate for the peace of the country that the conclusion which the court arrived at, was almost immediately overturned by an amendment of the Constitution.

We make one extract from the work before us, to show how entirely Mr. Jay was possessed by that spirit of self-sacrifice to which we have before alluded, as so characteristic of the men of the Revolution. He had been appointed, in 1779, envoy to Spain for the purpose, among others, of endeavoring to obtain a loan from the Spanish court.

The story of his daring self-devotion may be best told in the words of his biographer : —

“ In this emergency Congress took an extraordinary step which nothing but desperation could have prompted. Without the slightest surmise of what might be Jay’s reception or prospects of success in Spain, nay, without even apprising him of the step taken, it was resolved to draw upon him bills to the amount of half a million, payable in six months. The Spanish government, after authorizing the acceptance of these bills to the amount of a few thousand dollars, informed Mr. Jay that no more would be paid unless America agreed to furnish ships of war as an equivalent, or cede to Spain the sole right of navigating the Mississippi, but offered to guaranty the payment of \$150,000 in three years, if Mr. Jay could effect such a loan. The conditions imposed by Spain were rejected ; Jay attempted to effect the loan, but failed. In this emergency, he resolved upon a step of extraordinary boldness, it might be called rashness, a step, however, not hastily determined on, but one which his calm judgment dictated, and his reason approved. Without any present prospect of meeting these demands as they fell due, but with unshaken confidence in himself, his country, and its cause, he resolved to *accept all bills presented to him, at his own risk.*” — p. 25.

He persisted in this resolution. The bills thus accepted by him were not met, though he was soon relieved from his embarrassment through the agency of Dr. Franklin.

The most important single event in the life of Mr. Jay was his negotiation of the treaty, of 1794, with Great Britain. The biographer very reasonably doubts whether the terms of this treaty might not have been more favorable, had it not been for the ill-concealed, or rather the plainly manifested anxiety of Mr. Jay to procure a treaty of some sort with that power. At this day we can hardly wonder at the disfavor with which this treaty was received in the United States. Nothing but necessity could have justified its ratification, and it may well be doubted whether an undue regard for Great Britain did not then and for many a following year lead us into measures utterly

right disparaging to the national honor, until at length our intolerable grievances gave occasion to the glorious war of 1812.

We cannot refrain from making one more extract in illustration of the estimate then made of public men, and which might well be applied to our own time.

"Of the proceedings of this Congress of 1774, it is not necessary now to speak. It was composed of fifty-five members. Among them were the distinguished orators from Virginia, Patrick Henry and Richard Henry Lee.¹ The debate was opened by Mr. Henry in a speech of matchless power and eloquence—a vivid and glowing description of which has been drawn by the graphic pen of Mr. Wirt. Richard Henry Lee followed, and charmed with his graceful eloquence an audience that had been spell-bound by the more potent declamation of his colleague. As he closed, Mr. Chase, a delegate from Maryland, whispered into the ear of one of his colleagues, 'we may as well go home; we cannot legislate with these men.' The whole assembly seemed to acknowledge their superiority. Lee was made chairman of the committee to prepare the address to the People of Great Britain; and Henry of the committee to prepare the address to the King. It soon became apparent, however, that their superiority consisted in powers of eloquence alone. The address of Lee fell far short of the high expectations that had been raised. Its reading disappointed the whole assembly. 'After all,' remarked Mr. Chase, with that quick perception and ready boldness which so strongly characterized his mind, 'they are but men, and very common men, too.'² After some faint and equivocal compliments, the address was laid on the table, and Gov. Livingston and John Jay were appointed upon the committee."—p. 9.

The successor of Mr. Jay in the office of Chief Justice was JOHN RUTLEDGE, of South Carolina. He was a member of a family distinguished by their ability and their zeal in the Revolution. He held the most important posts in his native State, and in the old Congress. He was appointed by Washington during the recess of Congress.

Mainly owing to his having actively opposed the ratification of Jay's treaty, his nomination was not confirmed by the Senate, and he retired from the bench after presiding during a single term, when he delivered opinions in only two cases, and very briefly on both. He soon after declined in health, ultimately became insane, and in the year 1800 he died. The case of *Talbot v. Janson*, 3 Dallas, 133, is however noteworthy as being the first case in the Supreme Court, where the right of a citizen to expatriate himself was made the subject of discussion.

After the rejection of Rutledge, Washington nominated Mr. Justice Cushing, the senior Judge of the Supreme Court,

¹ Professor Tucker remarks in his *Life of Jefferson*, that though Henry and Lee bore the palm for eloquence in debate, yet "for that of the pen, the first place must unquestionably be awarded to Mr. Jay of New York."

² Wirt's *Life of Patrick Henry*.

for the vacant office, and his nomination was at once confirmed. But he declined it, preferring to remain in the position he then held.

OLIVER ELLSWORTH, of Connecticut, was then nominated and confirmed. Mr. Ellsworth was in Congress in 1778, and subsequently until 1782, which was his last year of service, and took an active part in the proceedings of that body. He was appointed to judicial office in his native State, and was a member of the convention which adopted the Constitution. He was very active and efficient in procuring the adoption of that principle in the Constitution which gives to each State an equal representation in the Senate. He was opposed to the tendencies towards centralization, and a strong advocate of the rights of the States. He was also a member of the Connecticut convention for ratifying the Constitution, and one of the first United States' senators from Connecticut, and was, as his biographer says, entitled to the chief paternity of the judiciary act of 1789. He was a supporter of Jay's treaty, and consequently voted against the confirmation of his predecessor, Rutledge, though no one has ever ventured to impugn his motives in so doing. He remained in the Senate until he was transferred to the bench as Chief Justice in 1796.

The opinions of Chief Justice Ellsworth are few, and brief, and hardly afford materials from which we can infer his character as a judge. We can only pause to notice the case of *Williams*, occurring on the circuit for the Connecticut District, when the Chief Justice denied the right of a citizen to expatriate himself, a well-known recognized principle in the old common law, but one which we think is hardly suited to the spirit of the present age. While still holding his office as Chief Justice, Ellsworth was appointed one of the envoys on the second mission to France. When we read of the open rapacity and insolence which distinguished the Directorial government of France in their conduct to our envoys, and compare the history of that time with that of the period when President Jackson procured justice in the matter of the claims against France, that were settled during his administration, we cannot but congratulate ourselves upon the increased power and influence of our country.

This mission was a point on which the ultra federalists, with Hamilton at their head, began to cool in their support of the elder Adams, who showed signs of change in that ex-

cessive deference to Great Britain, which had been the hobby and the mistake of the federal party. By the time the envoys arrived in France, the revolution of the 18th Brumaire had taken place, and Napoleon was seated on the consular throne. The matters in dispute were put in the way of adjustment, and our claims against France were finally settled, as we have said, under the administration of President Jackson.

Before his return home, Ellsworth visited England, and Mr. Wharton, in his notes to the American State Trials, gives the following description, quoted in this volume, of a visit by him to Westminster Hall.

"It was, as is said, during the train of arguments, which are reported in the beginning of the first volume of Mr. East, that the American Chief Justice visited Westminster Hall. The famous case of *Rex v. Waddington* was then before the Court, in which all the leaders of the bar were retained, and at the inception of which a scuffle is said to have taken place near Mr. Garrow's Chambers, between the emissaries of the two contending interests, each seeking to be the first at the door of that eminent advocate. Mr. Law led off for the defendants in the proceedings in arrest of judgment, and was followed by Mr. Erskine, Mr. Garrow, and Mr. Scott. Notwithstanding Mr. Jay's previous appearance at the Court of St. James, and the contemporaneous presence there of Mr. King, the fame of their accomplishments had not reached the King's Bench, whose precincts they had probably never invaded; and it was, consequently, with great curiosity that the elder lawyers, whose notions of America had been derived from the kidnapping cases which were the only precipitate cast on the reports of the Privy Council, by the current of colonial litigation, spied out the American Chief Justice. Mr. Ellsworth's simple but dignified carriage, so much like, as is said, that of his successor on the bench, was in happy contrast to the awkwardness of the English Chief Justice; and as soon as it was discovered that, though his worn and marked features bore a stamp which had not then become familiar to the English eye, he was neither an Indian nor a Jacobin, two things regarded as equally beyond the limits of civilized sympathy, he was surrounded by a knot of lawyers, curious to know how the common law stood transplanting. Still, the obscurity which hung around the history of the American Republic, could not but produce some confusion; and it was with this view of the supposed creolishness of the American people — a hybrid between the Englishman and the Indian, mingling the distinctive powers of each without that power of perpetuating them, which the old philosophers thought belonged only to unmixed races — that Judge Grose, with an air, it is said, of grave delicacy, inquired whether the obstruction of the course of descent had not turned fee simples into life estates. Perhaps to the same uncertainty may be traced the question which Mr. Garrow is said to have addressed to the American Judge, 'Pray, Chief Justice, in what cases do the half-blood in America take by descent?' " — p. 286.

On his return, he resumed his judicial labors in his native State. He died in 1807, at the age of 63.

With the exception of that of Washington, no name in

American history shines with a greater or purer lustre than that of JOHN MARSHALL. He was born in 1755. A soldier during the Revolution, the superiority of his character was developed at an early age. He was present, and did good service at the battles of Brandywine and Germantown, and shared the sufferings of the army in the winter encampment at Valley Forge. He resumed his pursuits as a lawyer towards the close of the war, and served in various public capacities in Virginia. Being a candidate for election to the convention in that State for the ratification of the Constitution, he refused to give any pledge to oppose it, and was elected, and effectively promoted its adoption. He soon rose to eminence at the bar and in political life, with a private character fully equal to his public reputation.

We have not space for details. His distinguishing characteristics were his fearless independence and his steady sacrifice of expediency and interest to his convictions of right. He supported the British treaty at the risk of losing his popularity and influence in a community strongly opposed to it. He was a member of the mission to France, of the unworthy treatment of which we have already spoken.

The envoys refusing to accede to the infamous demands of Talleyrand and the Directory, he and Pinckney returned *re infecta*, leaving Gerry behind.

He was soon elected to Congress, and raised his reputation still higher by his celebrated speech defending the action of the government in the case of extradition of Thomas Nash, *alias* Jonathan Robbins. This speech may be found in the Appendix to Bee's Reports and in the Appendix to the fifth volume of Wheaton's Reports. After holding for a short time the office of Secretary of State under the elder Adams, he was appointed to the station of Chief Justice, which he so long illustrated and adorned, and in which, after a service of thirty-four years, he died. We cannot go into the history of his judicial career, and can only refer to what we all know—his invaluable services in modelling and giving stability and consistence to our judicial system.

He presided in his circuit at the trial of Aaron Burr, and under his ruling on the law, a verdict of not guilty was necessarily returned.

The following anecdote will illustrate his well-known character for independence.

“ ‘Why did you not tell Judge Marshall that the people of America demanded a conviction?’ was the question put to Wirt, after the trial. ‘Tell him that!’ was the reply. ‘I would as soon have gone to Herschel, and told him that the people of America insisted that the moon had horns as a reason why he should draw her with them.’ ”— p. 379.

Mr. Chief Justice Marshall had warm political feelings. He was a decided federalist, and his opinions of Jefferson's policy was such as to lead to personal dislike. Yet these feelings never led him to support party measures, which in conscience he disapproved, as was shown by his voting to repeal the second section of the sedition law, in opposition to his party.

In closing this notice, we merely refer to Marshall's *Life of Washington* as the principal literary production of the great Chief Justice. This work, though not interesting in point of style, is invaluable as a narrative of events, in many of which the writer was an active participator, and the bearings and import of all of which he understood as well, at least, as any man of his time.

Chief Justice Marshall died in July, 1835.

The only other Chief Justice of the United States is the present incumbent, ROGER B. TANEY, and the time has not yet arrived for making a complete estimate of his life and labors. He was born in Maryland in 1777, and is said, in the volume before us, to be descended from Dr. Mainwaring, a distinguished loyalist in the reign of Charles the First, whose services in the earlier period of that monarch's struggle with Parliament did much to exasperate the bad feeling between them, and drew upon himself the enmity of the Puritans. Chief Justice Taney is a sincere, but liberal, Roman Catholic, and is, we believe, the most noted public man of that faith who has borne any part in the national government. He attained a very high rank at the Maryland bar, and in 1831 came into President Jackson's cabinet as Attorney General. He stood firmly by the President in his attack on the United States Bank, and was brought prominently before the country in 1833 by his appointment to the Secretaryship of the Treasury, after Mr. Duane's refusal to carry into effect the measure of removing the deposits of the public money from the United States Bank. Mr. Taney acting, as we believe, from sincere and honest conviction, concurred in this measure, and was selected by

79 fair
Chief Justice is 77 years old

the President as the agent to carry it into effect. He has long since lived down the obloquy, so freely poured upon the author and agents in that transaction. Upon the death of Chief Justice Marshall, he was nominated to succeed him, and confirmed by the Senate after a vigorous opposition. It is but justice to make the following extract in relation to this contest :

“ At the head of this opposition stood the acknowledged chiefs of their party, Messrs. Clay and Webster. The former of these, in particular, with the impulsive ardor of his nature, labored zealously to defeat the nomination, and signalized his assaults upon the nominee by an uncommon degree of asperity and bitterness of remark. I am informed by an eminent member of the Maryland bar,¹ who, though of opposite politics, was at the time warmly in favor of the confirmation of Mr. Taney, that Mr. Clay, not many years after, with the open and generous frankness of his nature, made the *amende honorable* to the Chief Justice, in a manner creditable alike to the characters of both. He frankly admitted to Judge Taney, that at the time of the nomination, he had used some harsh expressions, and made many unkind remarks in regard to him, which he sincerely regretted, adding, with a cordial shake of the hand, that he regarded him as a worthy successor of Chief Justice Marshall. It would have been difficult even for Mr. Clay to have framed a higher or more delicate compliment.”— p. 489.

He took his seat in 1837, and has discharged his duties since that time with the universal approbation of the profession and the country. The volume before us presents a *resumé* of the most interesting cases of a public character which have been decided during his time.

In a series of cases which are noticed in the book before us, p. 493, *et seq.*, the opinions of the Chief Justice, and of a majority of the court were given, sustaining the constitutionality of State laws therein impugned. It cannot be denied, that it has been the tendency of the later decisions of the court to interfere less with the powers of the State than was the case in its earlier history.

This tendency has no doubt been produced, in part, by the strengthening of the democratic feeling manifesting itself in a jealousy for State rights. This tendency was a cause of great regret to many who had been familiar with the court in its earlier days, and more especially to Mr. Justice Story, who, after the decision in the case of the *Charles River Bridge v. Warren Bridge*, wrote to Mr. Justice McLean in the following terms :

“ There will not, I fear, even in our day, be any case in which a law of a State, or of Congress, will be declared unconstitutional, for the old constitutional doctrines are fast fading away, and a change has come over the

¹ The late Attorney General of the United States, Mr. Reverdy Johnson.

public mind, from which I augur little good. Indeed, on my return home, I came to the conclusion to resign. But my friends have interposed against my intention, and I shall remain on the bench, at least for the present.' ”¹
— p. 497.

But it is our opinion that the evils that were anticipated from this change have not arisen, and will probably not arise. Recent events have shown that whatever may be the defects of the general government, they do not consist in want of strength or influence; and as every successful attack upon the acts of the States, tends either directly or indirectly to strengthen the central power, we think it a good omen for the future, that State legislation has been so much upheld in the Supreme Court of the United States. It is necessary, in such a system as ours, that the central government and judiciary should have some means of control over those of the States, but while such means exist, it is one of the surest signs of an harmonious and healthy action of the whole system, if it is exercised as seldom as possible at the expense of the subordinate power.

We must conclude this sketch with the closing words of the author, to the concluding paragraph of which we believe there will be a sincere and heartfelt response throughout the United States.

“ We may point to Judge Taney as one of our best specimens of the American lawyer and jurist. His whole life, from earliest manhood, has been professional. He is one of the few really eminent men of the country who have scarcely any political history. With the single exception of the brief period, during which he filled the office of Secretary of the Treasury, in the Cabinet of General Jackson, he was never at any time entirely withdrawn from the studies connected with his profession. The few years of his service in the Maryland legislature, temporarily diverted his attention, but did not entirely interrupt his legal pursuits. His appointment as Attorney General of the United States introduced him merely to a wider theatre of professional action. He came to the bench, a deeply read, and profoundly learned lawyer—a master of the principles, and thoroughly skilled in the practice, of the law. He brought with him large acquirements, and the fruits of a ripe experience, and the result has been, that he has sustained himself with ability and honor, as the head of the Federal Judiciary, and has proved himself, in the words of Mr. Clay, ‘ a worthy successor of Chief Justice Marshall.’ ”

“ Long may he continue to fill that place, and to enjoy that merited distinction. To one like him, we may address, in no spirit of unmeaning adulation, the words of the Roman bard —

Serus in cælum redeas. ” — p. 532.

¹ Story's Life and Letters. It may be added that Judge Story's chagrin arose mainly from the decision in the *Bridge* case, and that it was entirely disconnected from anything like personal feeling toward the Chief Justice and the majority of the court. In a letter written during the same term he remarks: “ The Judges go on quite harmoniously. The new Chief Justice conducts himself with great urbanity and propriety,” &c.

The volume before us appears to be written with ability and candor, and we consider it a valuable addition to our juridical literature.

There will be found in the notes, frequent and interesting sketches of the distinguished contemporaries of the Chief Justices at the bar, and on the bench, for which we can only refer our readers to the book itself.

ADMIRALTY REPORTS.

A *SUIT in rem* in the Admiralty, is a peculiar proceeding, known to no other branch of our customary law. It is a proceeding against a thing, and not between persons. In such a suit, the *res*, the *thing*, is the subject matter of the suit, and all the world are parties. Consequently, from time immemorial, these suits have been entitled after the vessel which is the subject of the suit, and not after any of the various and shifting parties who may intervene, at any stage of the cause, as libellants or claimants, originally or subsequently, for their various interests. The great Admiralty causes in which the leading principles of prize, of collision, of salvage, of wages, and of freight, have been decided, are known to the world, interestingly and picturesquely, by the names of the ships to which the incidents of capture, wreck, salvage, collision or service occurred. The Gratitude, the Bold Buccleugh, the Woodrop Sims, the Two Catherine, the Jungfrau Catharina, the Amiable Nancy, the Agincourt, the Genesee Chief, the Fortitude, the Henry Ewbank, rich in associations, at once suggest to the mercantile lawyer the history of the cause and the principles of law which it was the occasion of developing.

Not only is this old nomenclature interesting, picturesque, and venerable, and also suited to the theory and fact that the *res* is the subject of the suit and all the world parties, but it is a style which has its convenience. It distinguishes a suit *in rem* in the Admiralty from all other suits, and it is much more easily remembered than the names of parties. The mind associates more easily the events of a voyage, the loss by fire, or flood, or sunken rock, the deliverance, the capture, the re-capture, the collision,

and the questions of law arising from these events, with the vessel which was their subject, than with the Browns, Joneses and Robinsons who had their various shares in the litigation. If, for instance, suits had been brought for aid rendered to the San Francisco, the Home, the Ocean Monarch, or the Arctic, to which all persons pecuniarily interested would have been necessarily made parties, how much more easily would the suits and the respective principles of each be recalled by the ill-fated names, than by the cognomens of any of the various merchants or mariners who happened to be at the head of the list of parties proceeding or intervening.

These thoughts are brought up in the mind of the mercantile lawyer by seeing the irregular and unscientific way into which many of our reporters have lately fallen, of entitling, in the reports, indexes, and digests, the Admiralty causes *in rem*. Sometimes the cause is entitled after the libellants and the thing libelled, as *John Doe and others v. The Neptune*; sometimes the reporter diligently hunts out the names of the parties *pro* and *con*, and entitles the suit after the manner of a suit at common law, while sometimes, where there are cross-libels, the vessels are even made respectively to libel and claim each other, and in appealed cases the parties are not unfrequently styled plaintiffs and defendants in error.

If our learned reporters would follow the simple and reasonable practice, which they will find always adhered to in the English Reports, and in the reports of those courts most conversant with Admiralty usages in America, they will save themselves and the profession some confusion, and spare the feelings of many whose sea-going affections and associations have been lacerated by these innovations, and who cannot bear to see the noble ship robbed of her immortality, and submerged beneath a crowd of ignoble names.

NOTES TO LEADING CRIMINAL CASES.

REGINA v. LOWE.¹

July 19, 1850.

Criminal Negligence — Omission and Commission.

An act of omission, as well as of commission, may be so criminal as to be the subject of an indictment for manslaughter.

Where a man, appointed to superintend a steam-engine employed in a colliery, for the purpose of raising colliers from the pits, left the engine in the charge of an incompetent person, and in consequence of that incompetence, death ensued,

Held, that the man so leaving the engine was guilty of manslaughter.

THE prisoner was indicted for the manslaughter of Thomas Tibetts, on the 3d of June, 1850.

From the evidence in support of the charge, it appeared that the deceased was a collier, working in coal pits, and the prisoner was employed by Messrs. Jones and Darly, the owners of the pits, to attend the steam-engine by which the "skip," or basket, was raised up or let down the shaft of the pit with the workmen, on their way from and to their work. In the case of the men ascending the pit, it was the prisoner's duty to set the engine in motion to raise the skip until it reached about two feet above the surface or mouth of the pit, and then to stop the engine, so as to allow a "waggon" or platform to be moved over the mouth of the pit, and enable the men to get out of the skip with safety.

The prisoner, instead of attending at the engine, as was his duty, left it on the morning of the 3d of June, 1850, in the care of John Stockley, a lad fifteen years of age. Stockley remonstrated with the prisoner at the time, and told him that he, Stockley, would not work the skip. The prisoner replied that the witness was too idle to work it, but he would make him. The prisoner then went away to a public house.

During his absence the deceased, (having descended the pit early in the morning,) made the usual signal for the skip to be drawn up, by calling out to the boy stationed at the top of the shaft, whose duty it was in his turn to repeat the signal to the person having charge of the engine. In this instance the boy repeated the signal as usual, and Stockley set the engine to work, but failed in stopping it at the

¹ 4 Cox, C. C. 449; S. C. 3 Car. & Kir.

proper time, when the skip reached the surface with the deceased and two fellow-workmen. The failure was proved to be because "the skipper did not knock the engine up into the cap," Stockley stating that he did not know how to do it. The consequence was, that the skip was drawn up to the pulley over which the rope connecting the skip with the engine passed, and the deceased forced out, falling down the shaft, which was one hundred and seventy yards deep, and was of course killed.

At the close of the case for the prosecution,

Huddleston, for the prisoner, said he would take his lordship's opinion as to whether the facts, as proved, constituted the crime of manslaughter, or, in other words, whether a man whose duty it is to attend at a particular place or fill a particular office, and omits to attend, and leaves an incompetent person in his place, and death ensues, is guilty of manslaughter. In *Rex v. Allen and Clark*, 7 C. & P. 153, it was held that where a sailing vessel was run down by a steamboat in consequence of the improper steerage of the latter, arising from there not being a man at the bow to keep a lookout at the time of the accident, neither the captain or pilot could be convicted of the manslaughter of a person in the vessel run down. Parke, J., then observed — "Supposing the captain had put a man at the proper part of the vessel and gone to lie down, do you mean to say he would be criminally responsible? And you must carry it to that length if you mean to make any thing of it. And Alderson, B., said to the jury, 'There is no act of personal misconduct or personal negligence on the part of these persons at the bar.' A distinction appears to be taken between those cases where case or trespass would be, respectively, the civil remedy. In *Rex v. Green*, 7 C. & P. 156, also, it was held that to make the captain of a steam-vessel guilty of manslaughter, in causing a person to be drowned, by running down a boat, the prosecutor must show some act done by the captain; and a mere omission on his part, in not doing the whole of his duty, is not sufficient. No doubt seems to have been expressed that, supposing the captain had gone down to bed, and the accident happened, that he could not have been responsible. In the present case the prisoner had gone away to a public house."

LORD CAMPBELL, C. J. — I am clearly of opinion that an act of omission, as well as of commission, may be so criminal as to be the subject of an indictment for manslaughter, and

that there is evidence to go to the jury of such a criminal omission in this case.

Huddleston then addressed the jury on the question whether there was gross negligence; or, even if there was, whether the death of the deceased was caused by it.

Verdict, Guilty.

W. H. Cooke, and *E. V. Richards*, for the prosecution.
Huddleston, for the prisoner.

¹ It has sometimes been held, and not in harmony with *Regina v. Lowe*, that a negligent act of omission, is not punishable criminally; but that some positive act of negligence is necessary, in order to create criminal liability. See the opinions of Alderson, B. and Parke, J., in *Rex v. Allen*, 7 Car. & P. 153, A. D. 1835; and in *Rex v. Green*, *Ib.* 156.

These cases were indictments for manslaughter against the captain and pilots of a steamboat, for the death of a person on board of a smack, caused by running the smack down. The accident was attributed to the fact that a sufficient lookout was not kept at the bow of the steamer. Alderson, Baron, said to the prosecutor: "You put it as a case of a negligent act of omission. I have great doubt whether that amounts to manslaughter." And Parke, J., observed: "You must show some act done. You rather state it as if a mere omission, on the part of the prisoner, in not doing his whole duty, would be enough; and we are of opinion that it is not sufficient."

The soundness of any such distinction, however, as a general test of liability, may well be doubted, since a person is always bound by law to do his whole duty, and to positively perform all those acts which the law requires, as well as to abstain from doing those acts which the law prohibits. We see no reason why it should not be as censurable in law, as in ethics, to leave undone those things which ought to have been done, as well as to do those things which ought not to have been done. And indeed any such distinction is pointedly denied in the leading case of *Regina v. Lowe*, and the true and salutary rule of legal liability is expressly adopted and recognized.

And this is in analogy with the case of *Regina v. Spence*, 1 Cox, 352, A. D. 1846, where an English pilot, having the direction of a foreign vessel, failed to make the man at the wheel understand his orders, in consequence of which a boat was run down and a person in it killed. The point was taken that here there was no act of commission on the part of

¹ The following was accidentally omitted at the close of the note on *Hull's* case in our September number:—

But before a parent, master, or guardian, can be criminally liable for neglecting to provide food, &c. for an infant child, it must appear that the person accused had the means and ability of supporting the child, and that such child had actually sustained bodily injury from the neglect. The mere fact of abandonment, or neglect, would not alone amount to a criminal offence. See *Regina v. Hogan*, 5 Eng. Law & Eq. R. 553; *Saunders' case*, 7 Car. & P. 277; *Regina v. Phillpot*, 20 Eng. Law & Eq. R. 591; *Regina v. Renshaw*, 2 Cox, 295. And see *Regina v. Vann*, 8 Eng. Law & Eq. R. 596; that if a parent has the means, he is bound to give his child a Christian burial, and if he neglects to do so, and leaves the body exposed in a public place, he is guilty of a nuisance. But if not of ability, he is not bound to borrow, beg, or steal, sufficient for that purpose.

From the first proposition above laid down, we proceed to the second, viz. *That acts of omission are punishable as well as acts of commission.*

This will be treated of in our next number.

the pilot. He gave the right order, but the foreign helmsman misunderstood him. *Ld. Denman, and Alderson, B.*, both held that if the pilot produced the death by *any conduct* of his, he was guilty of manslaughter. And it was left to the jury whether the prisoner was guilty of negligence in not making the foreigners understand him thoroughly. Both of these cases seem hardly consistent with *Rex v. Allen*, and *Rex v. Green, supra*, but they seem to contain the better law.

In like manner, in *Regina v. Haines*, 2 Car. & Kir. 368, A. D. 1847, it was the duty of the defendant, as ground bailiff of a mine, to cause the mine to be ventilated, by directing air headings to be put up where necessary. By his omission to do so in a particular case, the fire damp in the mine exploded, and several persons were killed. Upon an indictment for manslaughter, it was claimed by the prisoner, that as he was guilty only of a breach of duty by *omission*, he was not guilty of the crime, and that some wrongful or improper act was necessary, and *Rex v. Allen* was relied upon. But Maule, J. told the jury — "The prisoner is charged with manslaughter, and it is imputed, that in consequence of his omission to do his duty, a person named Shakespeare lost his life. It appears that the prisoner acted as ground bailiff of a mine, that, as such, his duty was to regulate the ventilation and direct where air headings should be placed, and the questions for you to consider, are, whether it was the duty of the prisoner to have directed an air heading to be made in this mine; and whether by his omitting to do so, he was guilty of a want of reasonable and ordinary precaution. If you are satisfied that it was the ordinary and plain duty of the prisoner to have caused an air heading to be made in this mine, and that a man using reasonable diligence would have had it done, and that by the omission the death of the deceased occurred, you ought to find the prisoner guilty of manslaughter."

So in *Regina v. Pargeter*, 3 Cox, 191, A. D. 1848, the defendant was convicted of manslaughter for neglecting to give the proper signal to a railway train in motion, whereby a collision took place, and a passenger was killed. Although the case was strenuously defended, it was not intimated but that the defendant was liable for nonfeasance as well as misfeasance. On the same principle, Erle, J. ruled in *Regina v. Middleship*, 5 Cox, 275, A. D. 1860, that where a mother was delivered of a child while on a seat in a privy, if she had the means and power of procuring assistance and saving the child's life, but *neglected to do so*, she would be guilty of manslaughter.

But where an alleged crime consists in a mere breach of duty, it seems proper and perhaps necessary, that the indictment should positively allege that it was the prisoner's duty to do what was not done. See *Regina v. Barrett*, 2 Car. & Kir. 343, A. D. 1846.

And the same judge, and Martin, B., thought in *Regina v. Mabbett*, 5 Cox, 339, A. D. 1851, that if parents have not the means of providing proper food and nourishment for their infant children, who were incapable of taking care of themselves, and wilfully neglect to apply to the proper authorities for relief, knowing that such neglect is likely to cause the children's death, they are guilty of manslaughter, if death is thereby caused. We consider, therefore, the weight of authority entirely opposed to any sound distinction between acts of omission and commission in regard to criminal responsibility. If a greater degree of negligence is necessary as to the foundation of a liability *criminaliter*, than in civil cases, it may be that such degree was not proved in those cases where the distinction between omission and commission was first raised, which want of sufficient negligence may have been, in fact, the ground of the verdict of not guilty in those particular cases. However that may be, we think the true

law on this subject is laid down in our leading case of *Regina v. Lowe*.

But in order to create a liability criminally for neglect by nonfeasance, the neglect must be of some *personal* duty, the natural and ordinary consequences of neglecting which would be dangerous to life. There must be some direct and immediate connection between the neglect of duty, and the injury received, before the neglect can be considered a crime. Thus it has been held that the trustees of a road under an act of Parliament, whose duty it was *to contract* for the due repairs of the road, are not guilty of manslaughter in neglecting and omitting to contract for such repairs, whereby the road became dangerous, and a traveller was thrown out of a cart and died of his injuries. — Lord Campbell said the cases on this subject show a *personal* duty, the neglect of which has *directly* caused death; and, no doubt, where that is the case, a conviction of manslaughter is right. But how do these apply to trustees of a highway? How can it be said that their omission to raise a rate, or to contract for the reparation of the road, directly causes his death? If so, the surveyors or inhabitants of the parish would be equally guilty of manslaughter; for the law casts upon them the duty of keeping the roads in repair. To uphold this inquisition would be to extend the criminal law in a most alarming manner, for which there is no principle or precedent.

E. H. B.

REGINA v. LONGBOTTOM AND ANOTHER.¹

March 19, 1849.

Criminal Negligence — Negligence of both Parties.

Wherever death ensues from injuries inflicted by parties engaged in any illegal act, an indictment for manslaughter will lie, even though it appear that the deceased had materially contributed to his death by his own negligence.

~~The~~ indictment charged, that the two prisoners feloniously killed and slew John Truman, by driving over him with a gig.

O'Malley and *E. Rodwell*, for the prosecution, proved that the two prisoners, who lived in Ipswich, had gone to Bentley on the day named in the indictment in a gig, and that on their return at night they were observed to be in a state of partial intoxication. At several places they drove along the high road at a very rapid pace, and when they got within two miles of Ipswich they met three men. At that time they were laughing and driving rapidly down a hill, the top of which was thickly shaded with trees. When the three men got to the trees they found a man lying in-

¹ 3 Cox, C. C. 439.

sensible in the middle of the road, presenting all the appearance of having been just run over by some vehicle. They took up the man, who shortly afterwards died. On inquiry it turned out that the deceased was a man who had been deaf from childhood, but had, in spite of his infirmity, contracted an inveterate habit of walking at all hours in the middle of the road. Against the probable consequences of an indulgence in this habit he had been frequently warned, but without effect.

D. D. Keane, for the prisoner Longbottom, submitted, at the close of the case for the prosecution, that he ought to be acquitted, inasmuch as it appeared that the deceased had contributed in a great measure, if not altogether, to his own death by his own obstinacy and negligence. There was, moreover, no proof that the prisoners were driving at any extraordinary pace; while it appeared that they were in the middle of the road, and that the deceased was walking just where he ought not to have been, reference being had to the lateness of the hour, the darkness of the place, and his peculiar infirmity, which ought to have induced him to refrain from the selection of the most frequented part of the high road, as that on which alone he would walk. No accident could possibly have occurred to the deceased, if he had been at the side of the road, where foot passengers always walked. He had, therefore, contributed to his own death, and the question was, whether that fact did not exonerate the prisoner from such a charge as the present. This might be tested by analogy with a civil action under Lord Campbell's Act. Under that statute the representatives of the deceased could not maintain an action for compensation against the prisoners, as he had himself been guilty of negligence, so, in this prosecution, it was contended that the prisoners could not be convicted of the crime of manslaughter.

ROLFE, B.—I cannot stop the case; for whatever may have been the negligence of the deceased, I am clearly of opinion that the prisoners would not be thereby exonerated from the consequences of their own illegal acts, which would be traced to their negligent conduct, if any such existed. I am of opinion that if any one should drive so rapidly along a great thoroughfare leading to a large town, as to be unable to avoid running over any pedestrian who may happen to be in the middle of the road, it is that degree of negligence in the conduct of a horse and gig which

amounts to an illegal act in the eye of the law; and if death ensues from the injuries then inflicted, the parties driving are guilty of manslaughter, even though considerable blame may be attributed to the deceased. I do not at all recognize the analogy which has been put with regard to an action under Lord Campbell's Act and a charge of felony; and I abstain from giving any opinion as to the question whether, under the circumstances here proved, the representatives of the deceased would be precluded from maintaining an action for compensation against the prisoners. But there is a very wide distinction between a civil action for pecuniary compensation for death arising from alleged negligence and a proceeding by way of indictment for manslaughter. The latter is a charge imputing criminal negligence, amounting to illegality; and there is no balance of blame in charges of felony, but wherever it appears that death has been occasioned by the illegal act of another, that other is guilty of manslaughter in point of law, though it may be that he ought not to be severely punished. If the jury should be of opinion that the prisoners were driving along the road at too rapid a pace, considering the time and place, and were conducting themselves in a careless and negligent way in the management of the horse entrusted to their care, I am of opinion that such conduct amounts to illegality, and that the prisoners must be found guilty on this indictment, whatever may have been the negligence of the deceased himself.

Verdict, Guilty.

Sentence — eight months' imprisonment.

D. Power was counsel for the other prisoner.

It is a familiar principle of law, in *civil* cases, that where an injury is produced by negligence, the injured party has no remedy against the other, if his own negligence concurred in producing the result. But this rule never obtained in criminal law, for, as it is clearly laid down by Rolfe, B., in the leading case, the party principally in fault, is as much liable, *criminaliter*, as if his own negligence was the sole cause of the injury. And perhaps the rule in civil cases is founded not so much upon the notion that the defendant is less culpable, because the plaintiff was also in the wrong, as upon the well settled principle, that the law will not favor a claim for *damages* by one, who by his own conduct has in part produced his own injury. And therefore we find that when the prosecution becomes criminal, and no private pecuniary benefit is sought, the negligence of one party does not remove the responsibility of the other.

The principal case was determined in 1849, but the same doctrine had been previously acted upon by Pollock, C. B., in *Regina v. Swindall & Osborne*, 2 Car. & Kir. 320, A. D. 1846. In that case "the prisoners

were indicted for the manslaughter of one James Durose." "The second count of the indictment charged the prisoners with inciting each other to drive their carts and horses at a furious and dangerous rate along a public road, and with driving their carts and horses over the deceased at such furious and dangerous rate, thereby killing him. The third count charged Swindall with driving his cart over the deceased, and Osborne with being present, aiding and assisting. The fourth count charged Osborne with driving his cart over the deceased, and Swindall with being present, aiding and assisting.

Upon the evidence, it appeared that the prisoners were each driving a cart and horse, on the evening of the 12th of August, 1845. The first time they were seen that evening was at Draycott toll-gate, two miles and a half from the place where the deceased was run over. Swindall there paid the toll, not only for that night, but also for having passed with Osborne through the same gate a day or two before. They then appeared to be intoxicated. The next place at which they were seen was Tean Bridge, over which they passed at a gallop, the one cart close behind the other. A person there told them to mind their driving: this was 990 yards from the place where the deceased was killed. The next place where they were seen was forty-seven yards beyond the place where the deceased was killed. The carts were then going at a quick trot, one closely following the other. At a turnpike-gate a quarter of a mile from the place where the deceased was killed, Swindall, who appeared all along to have been driving the first cart, told the toll-gate keeper, 'We have driven over an old man;' and desired him to bring a light and look at the name on the cart; on which Osborne pushed on his cart, and told Swindall to hold his bother, and they then started off at a quick pace. They were subsequently seen at two other places, at one of which Swindall said he had sold his concern to Osborne. It appeared that the carts were loaded with pots from the potteries. The surgeon proved that the deceased had a mark upon his body which would correspond with the wheel of a cart, and also several other bruises, and, although he could not say that both carts had passed over his body, it was possible that both might have done so."

And the point now under consideration was thus clearly explained by the learned Baron. — "The prisoners are charged with contributing to the death of the deceased, by their negligence and improper conduct, and, if they did so, it matters not whether he was deaf, or drunk, or negligent, or in part contributed to his death; for in this consists a great distinction between civil and criminal proceedings. If two coaches run against each other, and the drivers of both are to blame, neither of them has any remedy against the other for damages. So, in order that one ship-owner may recover against another for any damage done, he must be free from blame; he cannot recover from the other if he has contributed to his own injury, however slight the contribution may be. But, in the case of loss of life, the law takes a totally different view — the converse of that proposition is true; for there each party is responsible for any blame that may ensue, however large the share may be; and so highly does the law value human life, that it admits of no justification wherever life has been lost, and the carelessness or negligence of any one person has contributed to the death of another person. Generally, it may be laid down, that, where one by his negligence has contributed to the death of another, he is responsible; therefore, you are to say, by your verdict, whether you are of opinion that the deceased came to his death in consequence of the negligence of one or both of the prisoners."

The same principle is involved in the case of *Rex v. Walker*, 1 Car. & P. 320, in 1824, although it is not brought out as distinctly in the sum-

ming up to the jury. In that case the prisoner was indicted for manslaughter in killing Thomas Crates.

The deceased was walking along the road leading from Bristol to Bitton in a state of intoxication. The prisoner was driving a cart drawn by two horses without reins; the horses were cantering, and the prisoner sitting in front of the cart. On seeing the deceased, he called to him twice to get out of the way, but from the state he was in, and the rapid pace of the horses, he could not do so; and one of the cart-wheels passed over him, and he was killed.

Garrow, B., laid down, that if a man drive a cart at an unusually rapid pace, whereby a person is killed, though he calls repeatedly to such person to get out of the way; if from the rapidity of the driving, or any other cause, the person cannot get out of the way in time enough, but is killed, the driver is in law guilty of manslaughter; and that it is the duty of every man who drives a carriage to drive it with such care and caution as to prevent, as far as is in his power, any accident or injury that may occur.

Regina v. Williamson, 1 Cox, 97, A. D. 1844, also sustains the leading case upon this point. There the prisoner, a waterman, having overloaded his ferry-boat, with passengers, and the boat being driven by the swell of a steamer against the bows of another steamer, the passengers all jumped up and tried to lay hold of the steamer. The ferry-boat was thereby upset, and one passenger was drowned. The prisoner called out to the passengers to sit still, when the boat struck, but they did not heed him. Williams, J. said — "If the jumping up of the passengers really caused the accident, the overloading of the boat was immediately productive of such a result, and thus the prisoner is answerable, for he should have contemplated the danger of such a thing happening."

In analogy with this principle, if a man receives a wound from another, by which his death is produced, the party inflicting the wound is liable for the consequences, although the deceased might have recovered by the exercise of more care and prudence. *McCallister v. The State*, 17 Alabama, 434, A. D. 1850; and see *Commonwealth v. McPike*, 3 Cush. 181, A. D. 1849; *Rew's case*, Kelyng, R. 26, A. D. 1662; *Commonwealth v. Green*, 1 Ashmead, 289, A. D. 1826. In this case it was said, that even if a wound is not mortal in itself, but from want of proper applications, or neglect, it turns to gangrene or fever, and that gangrene or fever is the immediate cause of the death, yet the wound being the cause of the gangrene or fever, is the mediate cause of the death, and the inflicter of the wound is guilty of murder or manslaughter according to the circumstances of the case. And the same is laid down in 1 Hale, P. C. 428. *Regina Holland*, 2 Mo. & R. 351, A. D. 1841, is an important case upon this point. The deceased having been severely wounded by the prisoner, who had with an iron instrument cut off one of his fingers, refused to have his finger amputated, and soon after the lockjaw came on, and the finger was then amputated; but it was too late, and the lockjaw ultimately caused death. The surgeon testified that in his opinion if the amputation had taken place at first, the deceased would not probably have died. It was held, notwithstanding the death was immediately caused by the refusal to submit to proper treatment, that the person inflicting the wound was guilty of murder.

The same general principles obtain in the Scotch law. See Alison's Principles of the Cr. Law of Scot., p. 146 - 151. It may be going too far to say that no medical treatment of a dangerous wound, can be so grossly erroneous as to lessen the responsibility of the author of the injury; but it is conceived that if the jury can say that the death was chiefly owing to the wound, and not to the maltreatment, the original wrong-doer is responsible for the fatal consequences.

If the negligence of the deceased or his physician is no shield or defence for the negligence of the prisoner, *a fortiori*, the negligence of third persons who are co-actors with the defendant cannot be. The negligence cannot be distributed, and the blame divided; but all who are guilty of the negligence, are equally guilty of the crime. *Regina v. Haines*, 2 Car. & Kir. 368, A. D. 1847.

The line of distinction, however, between cases where the negligence of the deceased is so far instrumental in causing his death, as to render another not culpable, and the instances before given, where such negligence was considered no palliation, is acknowledged to be delicate. Thus in *Rez v. Waters*, 6 Car. & P. 328, A. D. 1834; it appeared that the prisoner was a seaman on board a schooner, lying in the river Thames, and the deceased was a person in the habit of going about in a boat among the ships in the Pool, selling spirits, purl, hot beer, &c., and that on the day in question, the prisoner and he had some dispute about paying for some spirits, and, both being intoxicated, a good deal of rough joking had taken place between them. The first witness for the prosecution swore, that the deceased's boat being alongside the schooner, the prisoner pushed it with his foot, and the deceased stretched out over the bow of the boat to lay hold of a barge, to prevent the boat from drifting away, and, losing his balance, fell overboard, and was drowned. Parke, J., after consulting with Mr. Justice Paterson, said they were both of opinion that the evidence did not show the prisoner guilty of manslaughter.

E. H. B.

Recent American Decisions.

District Court of the United States, for the District of Massachusetts, September, 1854.

THE OSPREY.

Collision.

When a steamer meets a sailing vessel going free, it is the duty of the sailing vessel to keep her course, and the duty of the steamer to keep out of her way by all reasonable and practicable means in her power, without being restricted to going to the right or to the left, or to any other particular measure.—Law of Collision generally—General rules as to the course to be pursued by vessels approaching each other, to avoid collision.

THIS was a suit *in rem* promoted by Kenneth Urquhart and others, owners of the British brig Fanny, against the steamer Osprey, for a collision. At the same time a cross-libel was promoted by John Linton & Co. of Philadelphia, owners of the Osprey, against the brig Fanny. The two suits were tried together, upon the same evidence and arguments.

The facts of the case sufficiently appear from the opinion of the learned judge.

R. H. Dana, Jr., and *D. W. Gooch*, for the Osprey. The rules in the law of collision, which seem technical and arbitrary, will be found, on careful analysis, to be simple and founded in equity. All will be found to turn upon the consideration whether the two vessels meet on terms of equality or of inequality. If the former, the loss and labor of deviation is borne equally. If the latter, the vessel having the advantage, takes the whole duty upon herself, and the other vessel keeps her course. If the favored vessel *may* keep her course, she *must* do so, that the other vessel may know what to depend upon. Where both vessels are steamers, or both are close-hauled, or both are free, they are equal, and each keeps to the right. The rule where both are close-hauled, has usually been stated as though the vessel on the starboard tack was favored, but it is really only an instance of the rule that each keeps to the right. Where one is going free and the other is close-hauled, they are on an inequality, and the favored vessel takes the whole duty of avoiding the other, and the latter keeps her course. *The Gazelle*, 2 W. Rob. 517; *The George*, 5 Notes of Cases, 368; *The Woodrop Sims*, 2 Dod. 80; *The Speed*, 2 W. Rob. 223.

Where a steamer meets a sailing vessel close-hauled, it is well settled that the latter is to keep her course, and the steamer to get out of her way. *The Shannon*, 2 Hagg. 173; *The Columbine*, 2 W. Rob. 26; *The Gazelle*, lb. 517; *The Birkenhead*, 3 lb. 35; *The Vivid*, 7 Notes of Cases, 127.

Whenever one vessel is to keep her course, and the other is to take the whole duty of avoiding her, the latter, whether steamer or sailing vessel, is not restricted to going to the right, but may take any course and resort to any measures which are most judicious and convenient. *The Birkenhead*, 3 W. Rob. 75; *The James Watt*, 2 lb. 270; *The Northern Indiana*, 16 Law Rep. 434; *The Leopard*, Daveis, 193; *St. John v. Paine*, 10 How. 556; *Newton v. Stebbings*, lb. 590.

A steamer meeting a sailing vessel free, is a case of inequality, and should be governed by the latter rule. The proof, in this case, of a usage to that effect on the American coast is incontrovertible. It is founded in better

policy, because it gives one uniform rule in all cases of steamers meeting sailing vessels, and does away with all inquiries, at the time or afterwards, into the question whether the sailing vessel was close-hauled or free. It is also more equal. The judicial decisions in America favor this rule. *The Leopard*, Daveis, 193; *The Northern Indiana*, 16 Law Rep. 434; *St. John v. Paine*, 10 How. 556; *Newton v. Stebbings*, Ib. 590.

In the English cases heretofore cited, although the sailing vessels happened to be close-hauled, the rule was not restricted to those cases, and the case of the *Shannon*, 2 Hagg. 173, favors the uniform rule. The only case to the contrary is that of *The City of London*, 4 Notes of Cases, 40. In that case, the court follows a phrase instead of a principle, and feels bound to treat a steamer as a sailing vessel having the wind always free. That phrase was used in cases of steamers meeting vessels close-hauled, and was not intended to apply to and limit cases of steamers meeting vessels sailing free.

The rule we contend for is founded in usage, in policy, in equity, and is supported by the weight of judicial authority.

J. C. Park, for the *Fanny*, contended,

First. That upon the facts in the case, it appeared that the brig was coming up the harbor, about mid-channel, was holding her course nearly before the wind, and did not port her helm, until the steamer had put her helm to starboard, and veered to leeward; that then, it was done, to give the steamer more space and more time to "slow," "stop," and "reverse" her engine, and that she (the steamer) should have done this, and thus have avoided the collision.

Second. That if the brig did port her helm on discerning the steamer, she was right in so doing; — and reliance was placed on the opinion of Dr. Lushington in the case of *The City of London*, 4 Notes of Cases, 40, in 1845. In that case, which in most of its facts was similar to the one at bar, after stating the rule as well understood, that a steamer is to be regarded as a vessel sailing with the wind free, the court went on to say:

"I have had occasion over and over again to say in this court, and I shall endeavor to put it in the clearest language I can command, that whenever two vessels meet at sea, and there is any probable chance whatever of collision, it

is their duty to abide by the principles of navigation, and each of them to take the precaution to put the helm to port, when both are free, so as to avoid the chance of accident; and for this obvious and plain reason: that in a dark night like this, how often must it happen that some doubt will arise whether the vessel be direct ahead, or one point to the starboard or to the larboard? And are you to leave to mere chance the discovery of this with perfect accuracy, or are you not to adopt immediately that which is the only safe precaution; that is, following out the principle of the order, putting the helm to port at once, and so avoiding the collision?"

Third. That adherence to the rule laid down above by this highest English authority would insure against *the accident itself*, by giving an arbitrary rule, safe and sure, whether there really were danger or not; while the other rule, — that the sailing vessel should hold her course, and the steamer choose her course, at her own peril, although it might enable the court to determine with certainty where the fault lay after the collision had occurred, furnished by no means so sure a mode of avoiding it.

Fourth. That the rule of keeping to the right, having been adopted and sanctioned by judicial decision, and nine years' uniform practice in England and the British territories, (with whom was much of our commercial intercourse,) it was the best policy to adopt the same arbitrary rule, for the sake of uniformity of practice. Reverse Dr. Lushington's opinion, he argued; and the steamers and sailing vessels now multiplying between the two countries, must be governed by different rules, depending upon the waters they are navigating.

Fifth. To give an American decision adverse to that now prevalent in England for nine years, would place the vessels of the two countries in an awkward position. When two vessels should meet in a narrow channel in an obscure light, in waters not under the jurisdiction of either government, one would adhere to the American, the other to the English rule, and a collision would be the sure consequence. In obscurity and doubt, an arbitrary *uniform* rule of action is always the safest.

Sixth. It was contended that, on the evidence, the crew of the steamer descried the brig ten minutes before the collision, that the steamer was then going at the rate of six

miles an hour, and she must therefore have steamed one mile before the collision; that it had been shown that she could be stopped in two hundred yards, and, the engineer testifying that the signal to "reverse" only preceded the collision fifteen seconds, that it was culpable negligence in the steamer's crew not to "stop" and "reverse" sooner;—even though the sailing vessel had been wrong in "porting" her helm. For each vessel was bound to use all its powers to avoid injury to itself and others. Two wrongs could never make a right.

SPRAGUE, J.—In these cases I have received great aid from the learned and able counsel.

They are cross libels for damage by collision.

The collision took place about eight o'clock in the evening of the 12th of August last, in that part of Boston harbor called the Narrows, where the channel is about a fourth of a mile in width. When the vessels discovered each other, the *Osprey*, a steamer, was going down the harbor, in about mid-channel, at the rate of seven or eight knots, the northern shore being on her larboard hand, and the southern on her starboard. The *Fanny*, a sailing vessel, was coming up the harbor, nearer to the southern shore, and between the southern shore and the middle of the channel, and her direction was either straight up the channel, or inclined to the south. There was a five-knot breeze from the S. S. W., which was a free wind for the *Fanny*, being a little abaft her beam, and on her larboard side. Upon discovering each other, the steamer put her helm to starboard, and the *Fanny* put hers to port, which carried both vessels toward the northern shore, where the collision took place. The steamer went so far as to take the ground on the northern shore, which was very bold, just at the time, or a few seconds before the vessels came in contact. The *Fanny* ran head on to the steamer, striking her starboard bow at an angle of about forty-five degrees.

The collision would have been avoided by the steamer taking the measure she did, if the *Fanny* had either kept her course, or put her helm to starboard; and it also would have been avoided by the *Fanny* taking the measure she did, if the steamer had put her helm to port. According to the weight of judicial opinion and nautical practice in England, the brig was right and the steamer was wrong; but, according to the weight of judicial opinion, and nauti-

cal practice in this country, the steamer was right and the brig was wrong.

This renders it necessary to examine the question on principle as well as authority. The great increase of navigation within a few years past, and the multiplication of clipper ships and steamers, moving with great speed, and the vast amount of property, and the number of human lives constantly exposed to the dangers of collision, render it of great and increasing importance that the rules for its prevention should be uniform throughout the commercial world; and that they should be plain and simple, and founded upon principle.

All the rules upon this subject are founded upon the supposition that there is some reason to apprehend collision; for, if the position and course of the vessels are such that there is no danger of their coming in contact, the rules are not called into action, and each vessel keeps on her course. It is to be premised, in the first place, that the object to be attained is safety; and, in the next place that it is desirable that this should be attained at the least cost, whether that cost consist of labor, delay, or risk.

All the cases may be comprised in two classes — First, when vessels meet on terms of equality; Second, when they meet on terms of inequality. The first comprises three cases, namely:

1. Two sailing vessels, both going free.
2. Two steamers.
3. Two sailing vessels, both close-hauled.

To all these cases one simple rule may be applied, namely, — Both go to the right. This rule is partly arbitrary, and partly founded on substantial reasons. It is arbitrary so far as it directs to the right rather than to the left; but in requiring both parties to take measures as far as practicable to get out of the way, it is founded on principle.

Take the first case, that of two sailing vessels approaching each other, both having the wind free. By the rule, both must diverge from their course. The reason is, that safety is more certain than if one only diverged, and the inconvenience is justly divided between them; as both can deviate from their course with equal facility, and both can, by a free wind, regain the line on which they were sailing before they met.

The same reason applies to the second case, that of two steamers meeting.

In the third case, that of two sailing vessels, both close-hauled upon the wind, the rule, as generally expressed, is, that the one on the starboard tack shall keep on her course, and the one on the larboard tack shall give way, by porting her helm. But the rule thus expressed is, in effect, a direction to both to go or keep to the right. The one on the starboard tack, being close-hauled, is already going as far to the right as possible. When, therefore, the rule says she shall keep on her course, it, in fact, says she shall keep to the right. The one on the larboard tack also goes to the right, and she must deviate far enough to avoid the collision. She is thus, indeed, subjected to the whole inconvenience necessary to secure the safety of both, that is, to all the labor, delay and risk of diverging to the leeward; but this is because the other vessel cannot diverge from her course, by going farther to windward.

The second class, above mentioned, viz., where vessels meet on terms of inequality, embraces two cases atleast, viz. :

1. Two sailing vessels, one free and the other close-hauled.
2. A steamer and a sailing vessel, the latter being close-hauled.

Here the rule is, — that the vessel having the advantage must keep out of the way, and the other must keep her course. Thus, in the first case, that of two sailing vessels, one going free and the other close-hauled, the one having the advantage of a fair wind can diverge from the line of her course so as to avoid collision, and then return to that line, or take another verging toward it and carrying her to the same point. But the vessel which is close-hauled, whether on the larboard or starboard tack, can give way only by going to leeward, and cannot regain the line of her previous course, but when she again hauls to the wind, must proceed on a line parallel to her former course. She thus loses the whole distance she has diverged to the leeward, which may sometimes occasion great delay and hazard. The same reasons apply with increased force to the second case, — that of a steamer meeting a sailing vessel close-hauled; the motive power of the former giving her a greater advantage than even a fair wind does to a sailing vessel.

We come now to the case before the court, — that of a sailing vessel going free, meeting a steamer. Shall we apply to it the rule of the first class, which requires both to go to the right; or the rule of the second class, which requires

the one having the advantage to keep out of the way, and the other to keep her course?

1. A steamer has an advantage over a sailing vessel, even with a free wind. She can oftentimes turn in shorter time and space, and check, stop, and reverse her motion, in a manner which a sailing vessel cannot. The motive power of the one is under human control and at all times available; that of the other is not. The wind bloweth not only where it listeth, but when it listeth, and it is of importance to the sailing vessel to improve it to the utmost, while fair. It may suddenly come ahead, or wholly cease, and in the latter case, she would be helpless.

2. Safety and convenience are promoted by having the rules simple, uniform, and governed by a plain principle. If we require a steamer meeting a sailing vessel to keep out of her way, and the sailing vessel to keep her course, whether she be going free or close-hauled, we have one plain rule for all cases between steamers and sailing vessels, which may be instantly applied. The moment they see each other, both will know their duty—the one that she must keep her course, the other that she must keep out of the way by all means in her power, without being restricted to the right, or to the left, or to any other particular measure. If we have one rule when the sailing vessel is close-hauled, and another when she is going free, then the steamer must first ascertain the direction she is sailing, and then whether the wind is fair for that course, which may sometimes be a matter of doubt and difficulty; for the steamer is not as watchful of the wind, and cannot as readily determine its direction as if she depended on sails. As she moves rapidly, the wind will often appear to be more ahead, and consequently more fair for the approaching vessel than it actually is, especially if it be light; besides which, the wind may sometimes be baffling. All these doubts and uncertainties will be obviated by having one rule for all cases of sailing vessels meeting steamers.

3. The general principle is, that the vessel having the advantage shall take all the burden of keeping out of the way. This principle governs all other cases of inequality, and should be applied to this also, unless there be some necessity for making it an exception.

On the other hand, it may be said that by requiring both to go to the right, safety will be promoted, as they will separate more rapidly, and also that the inconvenience will be divided,

instead of being wholly borne by one. And these considerations certainly have weight. But they apply also to the case of a vessel close-hauled, with her larboard tacks aboard, meeting a steamer — and yet in such case, those considerations have never been thought sufficient to outweigh the advantage of the other rule. The force of this last remark, however, is weakened by the fact that the inconvenience of giving way is greater to a vessel close-hauled, than to one going free.

On the whole, the balance of advantage seems to be in favor of one uniform rule.

Let us now see how the question stands upon authority. In the case of the *City of London*, in the High Court of Admiralty in 1845, reported in 4 Notes of Cases, 40, it was decided by Dr. Lushington, assisted by Trinity Masters, that in a case like the present, both vessels must port their helm, that is, go to the right. This decision rests entirely on the proposition that "a steamer is always to be considered a vessel with the wind large." Is this proposition true? It is not laid down in any statute, admiralty regulation, rule of the Trinity House, or other maritime association; nor required by any judicial decision or previous nautical usage.

Cases had arisen of collision between a steamer and a sailing vessel, close-hauled, and the courts had decided that in such cases the steamer should be under as great obligations as a sailing vessel with the wind large, that is, must keep out of the way; and the reason is obvious. The steamer has at least as great power and ability as such sailing vessels, and therefore should be under as great obligation. But has she not greater power, and may she not be under greater obligation? This question was not involved in these previous cases, and was neither decided nor considered by the court. In those cases, the declaration that a steamer was to be considered a sailing vessel going free, was first made use of. That expression was well enough for the occasion on which it was used, and taken *pro hac vice*. But it is not to be presumed that the court intended to lay down the proposition that a steamer was at all times, and in all cases, to be deemed merely a sailing vessel going free; and if they did, so far as it went beyond the case before the court, it was no decision, but a mere *dictum*. That expression or proposition was taken up by the court in the case of the *City of London*, and made the sole ground of decision. But it is neither an argument; nor the statement

of a principle. It is rather an assertion, founded on a comparison, and comparisons may illustrate, but can prove nothing.

I have said that the assertion that a steamer is always to be considered a vessel with the wind large, taken as a general proposition, embracing the case now before us, is not sustained by any previous rule or nautical usage.

This is confirmed by the very authority we are now examining. The learned judge does not say, or intimate, that there had been any such rule or practice in the precise case, viz., a steamer meeting a sailing vessel going free; but states the practice in the case of two sailing vessels, both going free, and the Trinity rule as to two steamers, and then asserts that the principle of that practice and the spirit of that rule, are applicable to the new case then before the court. But, are they applicable? The two former cases are, as we have seen, those of perfect equality, and the latter, one of inequality. How, then, the principle, or spirit of the rule or practice which govern the former, is applicable to the latter, is not apparent without explanation, and the explanation is not given. It is to be regretted that that learned and able judge did not go into the *rationale* of the rule he was about to adopt, and make a comparison of its advantages and disadvantages, and show that it would conduce to the safety and convenience of navigation. This was not done. The reason assigned is not satisfactory. The decision, however, as an authority upon this subject, is the highest in England, and entitled to very great respect.

There is a case decided in 1828, reported in the 2d of Haggard, 173, *The Shannon*, in which the opinion of the Trinity Masters and the judgment of the court thereon, seem to be adverse to the decision in the case of *The City of London*. The report, however, is imperfect.

In the courts of the United States, there have been four cases bearing upon this question. In *St. John v. Paine, et al.*, 10 Howard, 557, a sailing vessel in Long Island Sound, while on her starboard tack, with the wind two points free, came in collision with a steamer. It was decided that the steamer was in fault, because on her rested the obligation to keep out of the way.

Mr. Justice Nelson, in delivering the opinion of the court, says that the sailing vessel was nearly close-hauled; and the decision may not perhaps be deemed a direct authority where she has the wind large, but the remarks of the learned

judge fully cover such a case. He says that a steamer has a greater power of directing her course and controlling her motion than a sailing vessel going free, and is bound to keep out of her way; and that a sailing vessel meeting a steamer may keep on her course, whether she be close-hauled or going free.

The same doctrine is countenanced by the case of *Newton v. Stebbings*, 10 Howard, p. 586, in which a sailing vessel coming down the North River, and carried mostly by the current, the wind being light, came in collision with a steamboat going up. The court held that the steamboat was to blame, in not keeping out of the way; and by the report it seems that they did not deem it necessary to inquire what was the direction of the wind, or how far it could control the movements of the vessel.

In the case of *The Leopard*, in the District Court of Maine, in 1842, Daveis' Rep., p. 193, a sailing vessel going up the Kennebec river, with a fair wind, came in collision with a steam ferry-boat. It was held, that the former had a right to keep on her course, and that the latter was bound to keep out of her way, on the ground that the steamer has greater ability than any sailing vessel.

In the case of *The Northern Indiana*, in the Northern district of New York, in the year 1852, 6 Law Reporter, (new series), 434, a sailing vessel on Lake Erie, on her larboard tack, with the wind one point, or one and a half free, came in collision with a steamer. It was held, that the former had a right to keep her course, and the latter was bound to take the necessary measures to avoid a collision.

We now come to the evidence of nautical usage. One witness, the pilot who had charge of the *Fanny*, and whose conduct is now in question, testifies that by the British practice, when a steamer meets a sailing vessel going free, both port their helm, and that the British steamers which come to Boston always act upon and inculcate that rule. On the other hand, several pilots and shipmasters testify, that in such case, on the American coast, the sailing vessel always keeps her course and the steamer must keep out of the way. Upon the whole, I am led to the conclusion, that when a sailing vessel going free, meets a steamer, the rule that requires the former to keep her course and the latter to keep out of the way, is best sustained by principle, by authority, and by the evidence before me of nautical usage.

It remains to be seen whether this rule is applicable to the place where this collision occurred.

There are various exceptions to these general rules, which cannot here be enumerated. In general, they will be found to rest upon the principle, that when the observance of the rule would not promote but defeat its great purpose, safety, the rule ceases to be obligatory.

Thus, if there be two sailing vessels, both close-hauled, and the one on the larboard tack is so far to windward of the other, that, if she ports her helm, it will produce collision, the rule ceases to be obligatory. Such distance to the windward has been sometimes defined by saying that if the vessel on the larboard tack would, if both keep their course, be struck by the other abaft the beam, on the starboard side, she is not to port her helm.

So also, when collision has become inevitable, the general rules are no longer enforced, but each vessel may adopt such measures as will diminish her danger.

Again, there may be obstructions to navigation, which prevent the application of the rule.

In this case, the vessels were in the Narrows in Boston harbor, where the channel is a fourth of a mile wide. The banks are bold and there was no current, rock, shoal, vessel, or other obstruction, to interfere with the application of the rule, and it was therefore obligatory upon both vessels. The *Fanny*, then, ought to have kept her course, and in deviating from it, she did wrong. The *Osprey* had a right to go to the left, and in putting her helm to starboard, she was not to blame.

But there is another ground on which it is insisted that the *Osprey* did wrong, and that is, in not stopping her engine as soon as she might and ought to have done, after she had put her helm to starboard, and saw that the *Fanny* had put hers to port. Although the *Fanny* made a mistake, yet the steamer was still bound to prevent a collision by all practicable and reasonable means, and when she saw that the *Fanny* had put her helm to port, she ought promptly to have stopped her engine, if that would have avoided the collision. How is the fact? (The judge here went into a particular examination of the evidence.) Upon the whole I do not think that it is shown that the *Osprey* was negligent in this respect, or in any manner to blame, and the decree must be against the *Fanny*.

Recent English Decisions.

*Exchequer Chamber. — Error from the Queen's Bench.
Wednesday, May 10, 1854.*

(Before JERVIS, C. J., POLLOCK, C. B., PARKE, B., ALDERSON, B., CRESSWELL, J.,
WILLIAMS, J., MARTIN, B., and CROWDER, J.)

BRIDGES v. FISHER.

*Lottery Acts — Illegal Agreement — Sale of Lands and Houses — Covenant
to secure payment of Purchase-money.*

To a declaration upon a covenant for payments of a sum of money, the defendant pleaded that before the making of the deed it was unlawfully agreed between plaintiff and defendant that plaintiff should sell and defendant buy lands and houses, to the intent and for the purpose, as the plaintiff well knew, that the same should be sold by lottery, contrary to the statute; that afterwards, in pursuance of the said illegal agreement, the said lands and houses were sold and transferred to defendant, and that, part of the purchase-money being unpaid, the defendant, to secure the payment thereof, made the covenant declared upon. Judgment for the plaintiff, *non obstante veredicto*, having been given in the court below:

Held, (reversing that judgment,) that the plea was a good answer to the action, inasmuch as it showed sufficiently after verdict that the covenant was made in furtherance of the original illegal agreement, and as, even if it would not bear that interpretation, it showed at all events that the security was given for an illegal consideration, and therefore void.

THIS was a writ of error brought by the defendant, upon a judgment given for the plaintiff by the Court of Q. B. *non obstante veredicto*, upon the first plea. See report of case in court below, 2 Ell. & Bl. 118; 21 L. T. Rep. 100.

Declaration.—For that defendant, by his deed bearing date 27th Oct. 1849, covenanted with plaintiff for himself, his heirs, executors, and administrators, that he defendant, his heirs, executors, administrators, and assigns, should and would well and truly pay or cause to be paid to plaintiff, his executors, administrators, and assigns, the sum of 630*l.*, with interest thereon after the rate of 5*l.* per cent. per annum, on 27th April, 1851, without making any deduction or abatement on any account whatever; and also, that in case the said sum of 630*l.* should not be then paid, defendant, his executors, administrators, or assigns, should and would thenceforth pay unto plaintiff, his executors, administrators, and assigns, interest for the same after the rate aforesaid, by even and equal half-yearly payments, until the same should be paid; yet defendant did not pay to plaintiff on 27th April, 1850, the principal sum of 630*l.*, or any part thereof, and the same is still unpaid, &c.

Plea 1. That before the making of the said deed in the declaration mentioned, it was unlawfully agreed by and between the plaintiff and the defendant that the plaintiff should sell, assign, and transfer to the defendant, and that the defendant should purchase of the plaintiff, and accept from him a conveyance of, certain lands and houses for the residue of a term of years, subject to a certain mortgage thereon, and to the payment of a certain sum of money at and for, and in consideration of, a certain sum of money to be therefore paid by the defendant to the plaintiff, to the intent and in order and for the purpose, as the plaintiff at the time of the making the said agreement well knew, that the said lands and houses should be exposed to sale and sold by way of lottery, or by lots, tickets, numbers, or figures, or by a method or device depending upon, or to be determined by, lot or drawing, contrary to the form of the statute in such case made and provided. And the defendant further says that afterwards, in pursuance of the said illegal agreement, the said lands and houses were sold, transferred, and assigned for the residue of the said term of years, subject as aforesaid; and a part of the said purchase or consideration money to be paid by the defendant to the plaintiff for the same being unpaid, the defendant, to secure the payment thereof to the plaintiff, made the said deed and covenant in the declaration mentioned, the said 630*l.* being parcel of that money.

The case was argued on the 4th of May, by *Hugh Hill*, for the plaintiff in error; and by *Willes*, contra.

The following authorities were referred to:—*Bartlett v. Vinor*, Carth. 251; *Lightfoot v. Tenant*, 1 B. & P. 551; *Paxton v. Popham*, 9 East, 408; *The Gaslight Company v. Turner*, 5 Bing. N. C. 666; 6 Ib. 324; 8 Scott, 609; *Jones v. Broadhurst*, 9 C. B. 173; *James v. Isaacs*, 22 L. J. 73, C. P.; *Belshaw v. Bush*, 11 C. B. 191; Chitty on Contracts, 3d ed. 663; Byles on Bills, 97; 1 Wms. Saund. 393; *Langton v. Hughes*, 1 M. & S. 593; *Pellicatt v. Angell*, 2 Cr. M. & R. 311; *Beaumont v. Reeve*, 8 Q. B. 483; and the stats. 10 & 11 Will. 3, c. 17, s. 1; 12 Geo. 2, c. 28, ss. 1, 4.

Cur. adv. vult.

JERVIS, C. J. now delivered the judgment of the court. This was a writ of error from the Court of Q. B. The declaration states in substance that the defendant, by his deed of covenant, covenanted with the plaintiff, for himself, his heirs, executors, and administrators, that he, the defend-

ant, his heirs, &c., shall and will truly pay the sum of 630*l.*, with interest, on a day named. The defendant pleaded, first, that before the making of the deed in the declaration mentioned, it was unlawfully agreed by and between the plaintiff and the defendant, that the plaintiff should sell, assign, and transfer to the defendant, and that the defendant should purchase of the plaintiff, and accept from him a conveyance of certain lands and houses for the residue of a term of years, subject to a certain mortgage thereon, and to a payment of a certain sum of money at and for and in consideration of a certain sum of money to be therefore paid by the defendant to the plaintiff, to the intent and for the purpose, as the plaintiff at the time of the making of the said agreement well knew, that the said lands and households be exposed to sale and sold by way of lottery or by lots, tickets, in numbers, or figures, by a method or device depending upon or to be determined by lot or drawing, contrary to the form of the statute in such case made and provided. And further, that afterwards, in pursuance of the said illegal agreement, the said lands and houses were sold, transferred, and assigned for the residue of the said term of years, subject as aforesaid; and part of the said purchase or consideration money to be paid by the defendant to the plaintiff for the same being unpaid, the defendant to secure the payment thereof to the plaintiff, made the said deed and covenant in the declaration mentioned, the said 630*l.* being parcel of that money. The second plea was, in substance, the same as the first, except that it stated the sale to be colorable. At the trial, the jury found the first plea for the defendant; but, the Q. B. having given judgment for the plaintiff *non obstante veredicto*, the defendant below brought this writ of error. The first question is, what is the meaning of this plea? It was stated in the argument that it did not sufficiently affect the plaintiff with a participation in the intent and purpose of ultimately selling the land by lottery; because the interpretation of the words "as the plaintiff, at the time of making such agreement, well knew," showed that the plaintiff merely knew of the intent; but we think the plea cannot be so read. After verdict, every fair intendment must be made in favor of the plea, giving full effect to all the words used; and, finding, as we do in this plea, a substantive averment that the agreement between the plaintiff and the defendant for the sale was to the intent and for the

purpose of a future sale by lottery, we cannot qualify that allegation so as to make the plea bad, merely because it is added, perhaps unnecessarily, that the plaintiff knew of that intent. It was also said in the argument, and this also formed the basis of the judgment of the court below, that it did not appear that the covenant was given in pursuance of that agreement, or was connected with it. If it were necessary to make the plea good, it might and ought after verdict, to be taken to mean that the lands were sold and transferred in pursuance of that agreement; and also, the consideration-money being in part unpaid, that the covenant was given in pursuance of the agreement. But, according to the view we take of this case, it is not necessary that the plea should be so understood. It clearly shows that the covenant was given to secure the payment of a part of the purchase or consideration-money for the land, the subject of the agreement. Upon the record so framed, and so understood, we are of opinion that the plaintiff in error is entitled to the judgment; and we therefore think that the judgment of the court below must be reversed. It is not denied that the original agreement was tainted with illegality. All lotteries are prohibited by the statute of the 10 & 11 Will. 3, c. 17, s. 1; and by the statute 12 Geo. 2, c. 28, s. 4, all sales of houses, lands, &c. by lottery are declared to be void to all intents and purposes. The agreement, being illegal, could not be enforced; and no action could be brought to recover the purchase-money of the land, the subject-matter of the alleged agreement. This was conceded in the court below, and was not denied in the course of the argument before us; and, if necessary, might be established by many authorities. But it is said the covenants may be good, and may be enforced at law, even although the original agreement was illegal, and the purchase-money would not have been recoverable by reason of that illegality, if it had not been secured by instruments under seal. It is certainly true that for a bond or other instrument under seal no consideration is necessary; but it does not, therefore, follow that every such instrument may be enforced by an action. The authorities cited in the arguments show that where a bond or other instrument is connected with an illegal agreement, it cannot be enforced. *Lightfoot v. Tenant*; *Parson v. Popham*; *Gaslight Company v. Turner*. Therefore, if these pleas allege that the covenant was

given in pursuance of an illegal agreement, they would upon these authorities be an answer to the action; but if they are not so understood, we think they show a good defence. It is clear that the covenant was given for the payment of the purchase-money. It springs from, and is the creature of, that illegal agreement; and if the law would not enforce the illegal contract, so neither will it allow parties to enforce a security for purchase-money, which by the original bargain was tainted with illegality. The case of *Beaumont v. Reeve*, much relied on by the counsel below, does not in our judgment affect this question. It is clear that past cohabitation and previous seduction are not good considerations for a parol promise; but they are not, therefore, illegal considerations — they are no considerations at all. But, inasmuch as a bond or other instrument under seal is good without any consideration, it by no means follows that a covenant to pay a sum of money, tainted with illegality, can be enforced merely because a bond for maintenance, founded on past cohabitation and previous seduction, is good. If the agreement had been made to pay a sum of money in consideration of future cohabitation, and after cohabitation the money had been unpaid, and a bond given to secure that money, that would be the same case as this; and such a bond could not under such circumstances be enforced. For these reasons we are of opinion that the judgment should be reversed.

Judgment reversed.

Court of Exchequer. — June 2, 1854.

THEOBALD v. THE RAILWAY PASSENGER ASSURANCE COMPANY.

Railway Accident — Insurance — Damages.

A party, having obtained a ticket of insurance against railway accident, during the journey for which he was insured, had occasion to get out of the railway carriage in which he was travelling; in doing so he put his foot on the step (which was wet) of the carriage, slipped from it, and seriously injured himself.

Held, that this was a railway accident within the meaning of the insurance, and the defendants liable but for the damage and expenses only. The true measure of damages is the amount of injury sustained by the accident.

THIS was an action against the defendants upon an insurance against railway accident. The plaintiff obtained his railway ticket from Birmingham to Shrewsbury, and

also an insurance ticket. It was a wet day, and, having occasion to get out at Wolverhampton, he put his foot on the step, which was wet, of the railway carriage; slipped from the step, and was much injured. The action was tried in London before the Lord Chief Baron, and a verdict returned for the plaintiff, damages £100 for loss of time, £100 for loss of profit, £34 for expenses, &c. A rule *nisi* was subsequently obtained to set aside the verdict for the plaintiff on the second issue, and to enter it for the defendants, or reduce the damages.

Bramwell, Q. C., and *Phipson*, showed cause.

Sir F. Thesiger, and *Davidson*, contra, in support of the rule. The several acts of Parliament were referred to, and *Sir F. Thesiger* contended that the accident, to come within the proper definition of railway accident, "must be connected with the trains, whether in motion or not, occasioned by the negligence of the company or by their servants or not, by unavoidable accident, or by collision with other trains, or otherwise, and not by the acts of the party himself." This was a question of law, and not free from some difficulty; it depended upon the particular construction of the terms used in the Acts of Parliament. *Cur. adv. vult.*

June 13. — *POLLOCK*, C. B., delivered judgment. — This was a motion to reduce the verdict, but also prayed that the verdict might be entered for the defendants upon one of the pleas. The objection to the verdict altogether was, that this was not a railway accident within the meaning of the policy of insurance. The objection to the amount of the verdict was this, that the defendants were not liable for loss of time or loss of profit, but that they were only liable for the injury occasioned by the accident, assuming it to be a railway accident. The case was argued a few days ago, and the court took time to consider, hoping in the mean time that the parties might possibly come to some arrangement; but it was intimated to us that there was an anxiety to procure the judgment of the court on the part of the company, and therefore they were unwilling to enter into any arrangement; and, I believe, on the other side also there was an indisposition to come to a conclusion. It would have been more satisfactory, perhaps, if our decision was to be taken as laying down any rule; it might have been more satisfactory if all the elements, which ought or might enter into such a question, were

more clearly or more plainly before the court. The facts of the case seem to be these. The plaintiff, who was about to take a journey into the north, a journey which involved his going by two distinct railways, insured with the defendants for the amount of £1000. In getting out of one of the carriages on a frosty morning his foot slipped; but the jury found that there was no negligence on his part in reference to the accident; and the first question to be considered is, whether this is a railway accident within the meaning of the policy; and we are of opinion that it is. I do not know, however much the company may desire that we should lay down a rule, that we are called upon, or that we should do our duty if we laid down any rule beyond that which was necessary to decide this case. Considering the great number of particulars that may enter into the decision of the question, the very complicated character which it may assume under some circumstances that at present we may not anticipate, I think it would be very unsafe; and I believe the rest of the court in that concur with me. On a single instance brought before us with certain circumstances alone, not all of them of a perfectly general nature, I think it would be assuming too much if we were to lay down a rule that is to govern all cases. It is sufficient for us on the present occasion to lay down so much of what we deem to be the law applicable to the case as is necessary to decide the present question. On the present occasion it is quite plain that the plaintiff was a traveller on the railway. It is quite plain that his journey, though it had in one sense terminated by the carriage having stopped, he had not at the time of the accident ceased to be connected with the carriage by being still in or upon it. He was stepping out of it when this occurred, without any negligence or culpable inattention to his security, which the jury have found. This occurred while he was doing an act, which, as a passenger, he must necessarily do; every passenger must get into a carriage and out of the carriage when the journey is at an end; and he can hardly be considered as disconnected with the carriage and railway and with the machinery of motion—he can hardly be considered as disconnected with it, until the time when he was safely landed, as it were, if we may use that expression, from the carriage, and got upon the platform. While in the act of leaving the carriage this accident occurred, and it is attri-

butable to his being a passenger on the railway, and it arises out of an act immediately connected with his being such passenger. Under these circumstances we are of opinion that this was a railway accident within the meaning of the policy. The action, therefore, in our judgment, is maintainable, and so much of the rule as prays to enter our judgment on one of the pleas, must be discharged. In order that the question might be considered, the verdict of the jury was taken separately: they found for damages and expenses £34 19s.; they found for loss of time £100; and they found for loss of profit also £100. At the time, the plaintiff at the trial made his claim for all three. He claimed £100 for loss of profits, £100 for loss of time, and £34 19s. for damages and expenses. I thought it quite clear he could not claim both loss of time and loss of profit; for in fact they are the same thing under two different forms. If he was indemnified for his time, then he had no right to charge for loss of profit; if he was indemnified for his profit, he had no right to charge for loss of time. I had very considerable doubts whether he was entitled to charge for either. I therefore directed the jury to find one only of those sums, reserving liberty to the defendant to move to reduce the verdict, and to strike out the £100. On considering the argument raised on both sides, we are of opinion that the verdict must be reduced to the sum of £34 19s. We are of opinion that the object of the insurance, whether with reference to death or any accident inflicting an injury short of death, must receive the same consideration; and we are of opinion, that in considering the damage and injury done to the traveller, the consequential mischief of losing some profit is not to be taken into consideration; otherwise a passenger whose time is more valuable than another, would, for precisely the same personal injury, receive a larger remuneration than another, whose time would be of less value. What the insurance company calculate upon indemnifying for, is the expense and pain and loss, it may be, of a limb, connected with the immediate accident, and not the remote consequences that may follow, according to the pursuit or profession which the passenger may be following. We think, therefore, that the verdict must be reduced to the sum of £34 19s. So much, therefore, of the rule will be absolute as reduces the verdict to that sum; and the residue of the rule will be discharged.

ALDERSON, B. — It was contended that the difference in the estimate of the damage must be in the same proportion between the amount of injury sustained by the accident, and the amount of loss by a total death. The amount is regulated in the case of death by the sum insured; and I believe the court are of opinion — I am sure I am — that we can institute no such comparison between the accident and the death, and that the true measure of damages is the amount of injury the plaintiff sustained by the accident, not exceeding the sum which they would have to pay in case of death; and my own impression is, that a railway accident means an accident to the person in the course of travelling by a railway, and arising out of the circumstance of that fact of travelling ending in injury, and it does not in the slightest degree depend upon any accident to the railway itself.

Rule absolute to reduce the verdict to £34 19s.

Abstracts of Recent English Decisions.

[Selections from the Marginal Notes of Cases reported in the Law Times, during July and August, 1854.]

Appeal from the Court of Session in Scotland.

Master and Servant — Negligence causing Death of Servant — Evidence for a Jury — Nature of Exception to Judge's Ruling. In an action by the widow of A., a miner, to recover compensation for his death, alleged to be caused by the negligence of the defendants, his employers, it appeared from the plaintiff's evidence that A. worked in the main road of the pit, taking out coal there; that he had often complained of a large stone in the roof, which was in a dangerous position; that defendants' manager had said there was no danger, but promised frequently to remove it, yet had not done so; that at last two men had been sent to remove the stone, and, on reaching the spot, they found A. filling his hutch with coals, and they waited till he should finish it, but before that had been done, the stone fell and killed A. There was conflicting evidence as to whether the men told A. to fill his hutch first, before they would remove the stone, or whether A., for his own benefit, asked the men to wait till he filled it:

Held, reversing the judgment of the Court of Session in Scotland, that there was evidence to go to the jury; and the two questions for them were — first, was the stone negligently allowed by defendants to remain in a dangerous position too long; and, secondly, did A. lose his life in consequence of that negligence, and not in consequence of his own rashness.

If an exception to a judge's ruling sufficiently call the judge's attention to the point, it is immaterial whether the counsel may set forth as the

ground of his exception that which is bad law. — *Paterson v. Wallace*, H. L.¹

Common Law.

Copyright — Right at Common Law — Right of Foreigners — Assignment abroad — Printing Foreigner's Works — Partial Assignment — Stat. 8 Anne, c. 19. Copyright, which is the exclusive right after publication of multiplying copies of a work, is not to be confounded with the right before publication to the MS. as a specific chattel.

An author has by the common law of England no copyright in his work after publication. The statute 8 Anne, c. 19, created that kind of property. But that statute confers copyright only on those owing an allegiance, natural or temporary, to this country, and first publishing here. Thus, a natural-born Englishman domiciled abroad, as he cannot shake off his natural allegiance, acquires copyright in his work by sending the MSS. and first publishing here. But a foreigner, residing abroad does not; nor can he secure copyright by sending an agent with his MSS. to this country: He must come here in person, though his residence here may be only temporary.

Held, per Lord St. Leonards. — An assignment of copyright, wherever made, and whether valid or not by the law of the country where made, will not be held valid in England, unless it is in writing, and attested by two witnesses: — Lord Brougham — hesitating whether an attestation of two witnesses was not dispensed with by 54 Geo. 3, c. 156: — No opinion by Lord Cranworth, L. C.

Held, per Lord St. Leonards. — The books, of which the stat. 8 Anne, c. 19, protects the copyright, must not only be first published, but they must be printed here. Hence there is no copyright in works printed abroad, and sent here to be first published: — No opinion by Lord Cranworth, L. C., or Lord Brougham.

Held, per Lord St. Leonards. — Copyright is in its nature an indivisible right; it may be transferred, but cannot be divided. Hence, a partial transfer, as for instance where the right is confined to the United Kingdom only, is void; but this is not to be confounded with a mere license: — No opinion by Lord Cranworth, L. C., or Lord Brougham.

A., a foreigner residing at Milan, composed an opera, and by a writing valid according to the law of Milan, assigned it to B., also a foreigner there residing. B. then came to England, where, by a deed attested by two witnesses, he assigned to C., a natural-born Englishman, for valuable consideration, the copyright for the United Kingdom. C. duly entered the book in Stationer's Hall, and first published it in this country, there having been no prior publication any where else. D., an English bookseller, printed and sold copies without C.'s consent.

Held, disagreeing with the majority of the judges, and reversing the judgment of the Ex. Ch., that C. had no right of action against D.; for C. could have no greater right than A., through whom he claimed; and A., being a foreigner resident abroad at the time of publication here, was not within the protection of the statute, 8 Anne, c. 19, and had no copyright by the law of England. — *Jefferys v. Boosey*, H. L.

Ship — Action for Freight — Jurisdiction of Admiralty Court — Plea in Bar. To an action for freight, the defendant pleaded that, before the freight was earned, the master of the ship raised money for the use of the ship upon bottomry-bond, pledging the ship and freight; and that upon the nonpayment of the sum borrowed, and after the commencement of the action, proceedings were taken in the Admiralty Court; and that, in

¹ House of Lords.

obedience to a monition from that court, the defendant paid into the Court of Admiralty the amount of the freight.

Held, a good plea in bar to the further maintenance of the action, although the amount secured by the bottomry-bond was less than the freight. — *Place and another v. Potts and another*. *Exch. Ch.*¹ *Error from Exch.*

Evidence for Jury — Railway Tickets — "Not Transferable" — Negligence. In an action against a railway company for injury to the plaintiff by negligence, the declaration alleged "that the plaintiff at the time, &c. was lawfully in a certain carriage upon a certain public highway called the Great Northern Railway." The defendants pleaded that "plaintiff at the time, &c., was unlawfully and not lawfully in the said carriage." The evidence went to show that a practice existed by which the reporters engaged on *Bell's Life* (of whom plaintiff was one) when going to any races travelled free. The plaintiff, acting *bonâ fide* in his capacity as reporter to the said paper, was supplied with a ticket which bore the name of a person connected with the paper, but not the plaintiff's, and on it were the words "not transferable," and a memorandum that any other person than the one named using it would be liable to a penalty, or liable to pay the fare; plaintiff showed this pass to the porter, whose business it was to examine them, who said it was all right, and put plaintiff in the carriage. It was not distinctly proved that the plaintiff was personally known to the porter; but it was proved that the plaintiff and other reporters had on several occasions travelled with similar tickets to that used in this instance by plaintiff, and upon which their names did not appear, but those of other persons, and that some of those persons were personally known to the officers of the railway; but knowledge of such acts was not conclusively brought home to the company.

Held, that there was evidence for the jury to consider whether plaintiff was lawfully in the carriage as alleged in the declaration; that the issue raised was not as to the lawfulness of the carriage being on the highway; but that the question was, whether the plaintiff was in the carriage under such circumstances as to be considered a trespasser. — *The Great Northern Railway Co. v. Harrison*, *Exch. Ch. Error from Exch.*

Evidence — Ancient Map — Production and Custody. On an issue whether a *locus in quo* is in the county of A., a map was tendered in evidence, printed on paper from an engraved copper-plate, and having on the face of it the following words: "New map of the county of A., taken from the original map published by B. C., in 1736, who took an accurate survey of the whole county, now republished with corrections and additions by the sons of the author, 1766, and engraved by D. E." This map was produced out of the custody of a county magistrate, who had had it in his possession for the preceding twelve years.

Held, that it was inadmissible in evidence, the statement on the map merely amounting to a statement of the sons of the author as to its accuracy, without in any way showing that they had authority to make the map from any one interested; and that the custody from which it came was also insufficient. — *Hammond v. Bradstreet*, *Exch. Ch. Error from Exch.*

Will — Construction — Estate for Life or in Tail. Devise of real estate to J. K. for life, and after his decease to the first son of the body of the said J. K., for and during the term of his natural life only, and from and after his decease to his first son, with remainder to the second, third, and all other sons of the body of such last-mentioned son forever, the elder being always preferred to the younger; and, in default of all such issue as aforesaid, then to the testatrix's own right heirs forever.

¹ Exchequer Chamber, Error from Exchequer.

Held, that the first son of J. K. took an estate for life only. — *Kershaw v. Kershaw*, Q. B.¹

Landlord and Tenant — Lease for Three Years not under Seal — Implied Tenancy from Year to Year — Notice to quit — Statutes 7 & 8 Vict. c. 76, s. 4, and 8 & 9 Vict. c. 106, s. 4. A tenant occupied premises for three years under an agreement of demise for that term, which was void by statute 8 & 9 Vict. c. 106, s. 4, because not under seal. Upon the expiration of the three years, the landlord brought ejectment, without any notice to quit.

Held, that the action was maintainable, because, though the statute rendered the instrument void as a lease, and the defendant was only tenant from year to year, that tenancy from year to year expired by agreement of the parties at the end of three years; and that in this respect the law was the same under statute 8 & 9 Vict. c. 106, s. 4, as it had been under the repealed statute, 7 & 8 Vict. c. 76, s. 4. — *Tress v. Savage*, Q. B.

Lease — Assignee of Reversion — Forfeiture — Covenant to Insure. An assignee of the lessor cannot take advantage of right of entry for breach in the time of lessor of a covenant to insure.

A lease, containing a covenant "that lessee will insure at his own expense, in the joint names of the lessor, his heirs and assigns, and the lessee, his executors, administrators, and assigns, in such fire office as the lessor, his heirs or assigns, shall direct," was assigned without notice to the lessee. Before the assignment there was no breach of the covenant of which the assignee could take advantage. At the time of action brought by assignee for an alleged breach of this covenant the premises were uninsured; but there was no evidence that defendant had notice of the assignment.

Held, that there was no breach of covenant since the assignment and before action of which the assignee could take advantage. — *Crane v. Batton*, Q. B.

Case for Arrest for excessive sum — Judgment — Ca. sa. — Indorsement. An action lies against an execution creditor for maliciously causing a warrant on a *ca. sa.* to be indorsed to levy the whole amount of a judgment when part has been satisfied, if damage is thereby caused to the execution debtor. — *Churchill v. Siggers*, Q. B.

Devise — Remoteness — Contingency — No lawful issue. Devise to E. the daughter of my said sister A. for life, and from and after her decease, to her eldest son then living (if any); "and in case of no lawful issue of any son," to the eldest son of my nephew J. W. then living, or unto the next eldest son of my nephew, R., by lawful issue. "And I do intend and purpose that the said messuages shall not be sold or divided, but always kept entire, and descend in perpetuity forever to the eldest heir-at-law of J. and A."

E. died a spinster. The plaintiff was the eldest son of J. W., and alive at the making of the will; and, J. W. being the eldest son of J. and A., and J. W. being dead, the plaintiff was also the eldest heir-at-law of J. and W.

Held, that by the will, on the death of E., a spinster, the estate passed to the plaintiff; and that the devise was not void for remoteness. — *Sarton v. Clapham and others*, Q. B.

Infancy — Ratification of Contract — 9 Geo. 4, c. 14. A. accepted a bill of exchange during his infancy, and, after attaining his majority, wrote to the holder of the bill, "Pray make yourself easy about it (the bill); I will take care it is paid. And Sir Henry (meaning the father of the drawer) returns to England in June."

¹ Queen's Bench.

Quære, was this a sufficient ratification to take the case out of the 9 Geo. 4, c. 14?

Per Parke and Alderson, BB., it was not.

Per Platt and Martin, BB., it was. — *Morson v. Blane, Exch.*¹

Contract for Wool — Condition precedent — Pleading. The declaration stated a contract for wool to arrive at 10½d. per pound, laid down either at Liverpool, Hull, or London, deliverable at Odessa during August then next, to be shipped with all dispatch, &c.; the names of the vessels to be declared as soon as the wool was shipped; that the wool was delivered at Odessa, to the agents of the plaintiff, and was with all dispatch shipped on board a certain ship, which sailed from Odessa with the said wool on board, and afterwards arrived at Liverpool with the said wool on board. There was further an averment of notice to the defendants, and of the lapse of a reasonable time after arrival, and of performance by the plaintiff of all conditions.

Breach, the defendants would not accept or pay for any part thereof.

To this the defendants pleaded, that they agreed with plaintiff to buy the said wool for the purpose of reselling the same in their trade; that wool fluctuated greatly in price in the market, and that they could only resell the said wool when they had notice of its being shipped, and the name of the vessel in which it was shipped declared according to the contract mentioned in the declaration, of which plaintiff had notice; but that plaintiff did not declare to defendants the name of the vessel in which the wool was shipped at or within the time within which he was bound to declare, that is to say, as soon as such wool was so shipped, but omitted and delayed so to declare the name for a long and unreasonable time; and before they had such notice, the price of wool had fallen in the market, &c., wherefore they did not, nor would accept or pay for the said wool.

Held, a good plea, such declaration of the name of the vessel being a condition precedent to the acceptance of the wool. — *Graves v. Legg and another, Exch.*

Contract for Iron — Merchantable quality — Warranty. A contract was entered into between an iron manufacturer in Staffordshire, and a merchant at Liverpool, for certain hoop iron, to be delivered at Liverpool within a certain time, and to be sent by canal; and the goods in the course of the transit, and in consequence of the inclement season of the year, unavoidably got rusted.

Held, that there was no implied warranty on the part of the manufacturer to deliver the goods at Liverpool in a merchantable condition, but that the vendee was subject to the risk of the deterioration necessarily consequent upon the transmission of the iron. — *Bull v. Robison, Exch.*

When a ship is advertised to sail by a certain day: Quære, what is a reasonable time for its sailing? and whether more than a contract to sail within a reasonable time from the date is implied. — *Taylor v. Tindall and others, Q. B. N. P.*,² before Erle, J.

Evidence — Telegraphic Messages — Contract — Commission. Semble, telegraphic messages are admissible evidence.

A broker cannot recover on a *quantum meruit* for the sale of a ship unless the contract be signed by vendor and purchaser, and the sale in all other respects be complete. — *Meeson v. Oliver, Q. B. N. P.*, before Coleridge, J.

Use and Occupation — General Issue — Waiver of Contract. An agreement that rent shall not accrue until the premises are complete, does not

¹ Exchequer.

² Queen's Bench. Nisi Prius.

preclude a lessor from recovering for use and occupation, if the lessee enters actually or constructively. — *Smith v. Eldridge and another*, C. C. P. N. P.,¹ before Williams, J.

Equity.

Practice — Substituted Service — Infants — Jurisdiction over when resident abroad — Custody — Ward of Court. The principle on which substituted service is ordered is, that there is reasonable ground to suppose that the service will come to the knowledge of the defendant.

This court has jurisdiction over infants who are natural-born English subjects, though born and resident abroad.

This court will not, except under very special circumstances, make an order with reference to the custody of infants in a case where the court sees no reasonable means of enforcing compliance with its order. — *Hope v. Hope*, C. A. C.²

Principal and Surety — Discharge of Surety — Bankers. By articles of partnership it was agreed that A. and B. should carry on business together in partnership for five years. A joint and several bond was given by B. and C. to A., to indemnify him from all loss which might arise from carrying on the business; C., however, being only a surety for B. The business was carried on by A. and B. twenty months after the expiration of the five years. A dissolution then took place, and A. left the assets under the sole control of B., for the purpose of winding up the affairs of the partnership. Subsequently B. left the country, taking with him a portion of the assets, and left the partnership concern unable to meet its liabilities. A. afterwards discharged these liabilities, and took proceedings at law upon the bond against the executors of C.

Held, that the conduct of A. had been such with respect to carrying on the business after the expiration of the five years, and in other respects, as to discharge C. from his liabilities as surety on the bond, although he knew that the partners were not proceeding to wind up the partnership at the stipulated period.

Where a plaintiff makes a case founded on fraud, and an alternative case not founded on fraud, his bill will not be dismissed because he fails to prove fraud, if he prove the other case. — *Small v. Currie*, C. A. C.

Will — Construction — Clause of Substitution — "Said Children." A testator having given a sum of stock to trustees upon trust for E., one of his children for life, with remainder to E.'s children, share and share alike, gave the same in default of children of E., living at her death, to "all and every my children, then living, and the child or children of such of my said children as shall be then dead, in equal shares and proportions; but so that such my grandchildren shall only be entitled among them to such share or shares as their parent or parents would have been entitled to in case they had been living."

Held, that, upon the death of E. without issue, the children of a child of the testator, who had died before the will was made, took no interest under the gift. — *Re The Trustee Relief Act, and Re The Trusts of the Will of Peter Thompson, deceased*, C. A. C.

Will — Construction — "Money" — Funds. A testatrix, being entitled to certain sums of money in the Funds, and possessing also a small sum of cash in the house, bequeathed by will the whole of her money to a tenant for life; at his death to be divided between her nieces A. and B.; her clothes to be divided likewise between them, her watch and trinkets for her niece B.; and declared that the longest survivor of her said nieces was to become possessor of the whole money.

¹ Court of Common Pleas. Nisi Prius.

² Court of Appeal in Chancery.

Held, affirming the decision of the court below, that the money in the Funds did not pass under the description of "money."

The word "money" in a will, will only be taken to have been applied in its correct and proper use, unless there is something in the context which evidently points to a more extended signification. — *Low v. Thomas*, C. A. C.

The Right of the Crown to the Seashore — Prerogative of the Crown. The average of the medium tides in each quarter of a lunar revolution during the whole year gives the limit, in the absence of all usage, to the Crown to the seashore. — *The Attorney-General v. Chambers and others*, C. A. C.

Will — Construction of — Intention — Perpetual Annuity — Estate Tail — Issue taking by Purchase — Recital — Rule in Shelley's Case — Knight v. Ellis, 2 Bro. C. C. 509, approved. T. W., by his will, gave to A. M., wife of R. M., "an annuity of 600*l.* to commence six months after my decease, for her life, and the issue from her body lawfully begotten, on failure of which to revert to my heirs. And I have to request that my very good friends N. E. K. and J. C., will act as trustees to the said A. M., so that the said annuity may be secured for her sole use and benefit, and that it may be paid to her quarterly or half-yearly, as they may deem proper."

Held, by the Lord Chancellor and Turner, L. J., that the word "issue" was there a word of purchase, and that A. M. took an equitable interest only for her life for her separate use, and that her children and other issue upon her death took the annuity as a class in equal shares as joint tenants.

A deed was executed in 1797, putting a particular construction upon the will. A. M., not being a party to the deed of 1797, executed a deed in 1808, previously to her marriage, which deed recited the former deed.

Held, by Knight Bruce, L. J., that, as against the issue of the marriage, A. M. was bound by that recital, and could not put an opposite construction upon the will.

Rules drawn from principles of tenure have been adopted as canons of construction, in cases where tenure is out of the question; but by such adoption the intention of donors or settlers has been defeated.

There is no doubt but that the intention ought to prevail, if it can be enforced without breaking in upon any rule of law; but this resolves itself into a question of construction. But the rule, that words which would give an estate tail in a freehold, are to be considered, in the case of chattels, as giving the thing absolutely; for that no chattels can be limited over after a dying without issue; this rule is too strong to be got over.

A bequest of personal property to a man for life, and afterwards to the heirs of the body, is an absolute bequest to the first taker. Whatever disposition would amount to an estate tail in the land, gives the whole interest in personal property, which is incapable of being entailed.

Whatever would, directly or constructively, constitute an estate tail in land, will pass an absolute interest in personal estate.

Whenever the words of a will used in a bequest of personal property would, if applied to real property, give an estate tail, they pass an absolute interest in personalty, unless the testator shows a clear intention that they shall not be so construed.

A limitation of personal property after a disposition, that would raise an entail express or implied in real estate, is void, and the person who would be tenant in tail takes the absolute interest.

The words "in default of issue," or "if any," have no restrictive effect.

The word "issue" must be construed as a word of limitation, unless the context of a will affords sufficient reasons to construe it otherwise.

"Issue" will extend to any remote degree, as a description of objects.

The rule of law which construes "issue" as *primâ facie* a word of limitation, rests either on its being derived from the old law, which upon feudal principles was much directed against the successors to real estates taking otherwise than by descent, or on the ground that the word "issue," taken *per se*, includes all the issue, and that the best mode of effectuating the intention in favor of all the issue, is to give an estate tail to the parent, which in course of devolution would embrace them all. A rule resting upon such foundations can have no application to personal estate. — *Re The Trustee Relief Act* (10 & 11 Vict. c. 96), and *Re The Trusts of the Will of John Wynch*, C. A. C.

Will — Construction — Dower — Election. A testator by his will gave his personal estate and an annuity to his wife, and devised his real estate to trustees, with power to let the same until all his nephews and nieces were of the age of twenty-one years, after which period he directed that the estates should be sold, and the proceeds go equally amongst his nephews and nieces, share and share alike, except two.

Held, affirming the decision of the court below, that the widow was put to her election between the bequests and the dower.

A power of leasing given to trustees is sufficient to indicate the intention on the part of a testator to exclude his widow from her dower. — *Parker v. Sowerby*, C. A. C.

Family Arrangement — Compromise of supposed Rights not actually existing; when valid — Mistake. A family arrangement, entered into for the purpose of compromising supposed rights, is not valid in a case in which it afterwards appears that no such rights exist — no doubt as to the existence of such rights having, during the negotiation, presented itself to the mind of the party making the compromise: otherwise,

Seemle, such a compromise would have been supported.

By a settlement, lands were limited in strict settlement to A., B., and C., and their issue in tail successively, subject to a trust thereby created for raising, after the death of A., B., and C. respectively, portions for their younger children, to be vested and payable on their attaining twenty-one, with maintenance in the mean time equal to the interest of their shares at the rate of 5l. per cent. A. died a bachelor; and B. became tenant for life of the property. C. died in B.'s lifetime, leaving several children. Some years after his death they claimed their right to have their portions raised and paid, with interest, from the death of the father. A compromise was effected between B. and the children of C., by which they agreed to accept a sum less than what would be due to them for arrears of interest (assuming the portions to be raisable during the lifetime of B.); and it was agreed that the portions should be raised within a limited time, with full interest in the mean time. It was afterwards decided by the court that these portions were not raisable.

Held, that the compromise was invalid; and the deed was decreed to be set aside, the court being of opinion, upon the evidence, that, during the whole of the negotiation, a doubt on the question whether the portions were raisable during the life of B. (the plaintiff) had never presented itself to his mind; and that the only question of compromise was the amount of his liability, and the mode in which the claim of the defendants was to be satisfied. — *Lawton v. Campion*, R. C.¹

Mutual Accounts — Intricate and Complex Accounts — Bill — Demurrer. An account between an attorney and solicitor and agent and his client and principal of his receipts and payments, for or to or on behalf of the latter,

¹ Rolls Court.

and of loans made by the attorney to his client, and of moneys paid by his client to him, and of moneys owing to the attorney from the client in respect of his bills of costs, is not a case of mutual accounts entitling the attorney to a decree for an account.

Upon demurrer, a general allegation that the accounts are of an intricate nature is insufficient to entitle the plaintiff to a decree, but must be supported by specific allegations of facts showing the intricate and complex nature of the accounts. — *Padwick v. Hurst*, R. C.

Statute of Frauds — Declaration of Trusts under Sect. 7 — Instrument of a testamentary Character. A. purchased real estate, which was conveyed by the vendor to a trustee, to such uses as the trustee should appoint, and in default thereof to the use of the trustee absolutely. The deed has continued in the possession of the trustee, but A. always received the rents. Shortly afterwards A. delivered to the trustee a paper, signed by him, which desired the trustee, after his (A.'s) death, to hold the property, upon certain trusts, for his (A.'s) wife and his children.

Held, that the instrument signed by A., was a good declaration of trust, within the 7th section of the Statute of Frauds, and was not of a testamentary character. — *Tierney v. Wood*, R. C.

Purchaser without Notice — Prior Mortgage — Deeds left in possession of Mortgagor — Fraud — Laches. S. mortgaged certain property to F. The same solicitor was employed by both parties; he, as the solicitor of the mortgagor, retained the title-deeds, representing to F., that certain documents which he delivered to him were the title-deeds. S. subsequently sold the property to C., who had no notice of the mortgage.

Held, that it was no defence to a bill of foreclosure by F. that C. was a purchaser without notice; also, that F. had not been guilty of laches with respect to the possession of the title-deeds, so as to deprive him of his security.

The property was sold to pay certain legacies charged upon this with other property.

Held, that this did not give the purchaser a good title against F., who was entitled to have the legacies paid out of the other property. — *Colyer v. Finch*, R. C.

Gift in anticipation of Legacy — Loan — Intestacy. Where a *feme sole*, having made a will giving a legacy to her daughter, at the request of that daughter advanced the amount to the daughter in her lifetime, with a promise that she (the mother) should receive interest for the same for her life, which interest was duly paid, and the mother afterwards revoked her will, and died intestate:

Held, that the advance to the daughter was a loan, and not a gift; and her representative bound to account for the same to the mother's estate. — *Rannie v. Chandler*, V. C. S. C.¹

Appointment of Trustees under a Power. A deed of settlement, in which three trustees were named, contained a power of appointment of new trustees, whereby it was provided that, in case the three trustees, or any of them, should die, or be desirous to be discharged, or should neglect or refuse to act, it should be lawful for the husband and wife, and the survivor, to appoint "any other person or persons to be a trustee or trustees for the several purposes aforesaid, in the place or stead of the said trustee or trustees who should so die or be desirous to quit, and be discharged," &c. The husband died, and afterwards two of the trustees; the third was desirous of relinquishing the trusts.

¹ Vice Chancellor Stuart's Court.

The widow alone, by deed-poll indorsed on the deed, and in execution of the power, appointed two trustees in the place of the original three.

Appointment confirmed.—*Re Poole Bathurst's Estate, and Re The South Wales Railway Act, 1845, and The South Wales (Amendment) Act. 1846, ex parte Charles Bathurst, V. C. S. C.*

Miscellaneous Intelligence.

OATHS.—The Court of Appeal has decided that the oath to tell "the whole truth and nothing but the truth," prescribed by the 155th article of the criminal code, and to be taken by witnesses heard before the public tribunals, partakes of a sacramental *formula*, which, by any modification, is rendered a nullity; therefore a judgment, which recites that the oath taken was merely "to tell the truth and nothing but the truth," is void.—*Gazette des Tribunaux, Paris.*

A WOMAN APPARENTLY WHITE SURRENDERED TO SLAVERY—**FOURTH DISTRICT COURT.**—A rather singular case came before this court yesterday. Some days since a woman named Pelasgie was arrested as a fugitive slave, who had lived for more than twelve years in this city as a free woman. She was so nearly white, that few could detect any traces of her African descent. She was arrested at the instance of a man named Raby, who claimed her as belonging to an estate of which he is heir at law. She was conveyed to the First District guard-house for safe keeping, and while there she stated to Acting Recorder Filleul, that she was free, had never belonged to Raby, and had been in the full and unquestioned enjoyment of her freedom in this city, for the above-mentioned period. She also stated that she had a house well furnished, which she was in the habit of letting out in rooms. About this time a lawyer appeared before the Recorder, and stated that the woman was born in slavery, and now belonged to a man in Mississippi. He produced a bill of sale which corroborated his assertion, and which stated that in a certain number of years she was to be set free. This being a sort of triangular fight, the woman, Raby, and the lawyer, forming the corners, the Recorder found himself somewhat at a loss what to do, and as Raby pressed his claim, the Recorder advised him to apply to one of the district courts. Accordingly he applied to the Fourth District Court, and took a rule on Acting Recorder Filleul to show cause why a mandamus should not be issued compelling him to deliver up the woman. Mr. Filleul appeared before the court and stated the circumstances mentioned. Judge Reynolds decided, however, that Raby was the owner of the woman, and ordered the rule to be made absolute, and a writ of mandamus to be issued upon Acting Recorder Filleul, for the surrender of the slave. The issuing of the writ, however, was rendered unnecessary by the declaration of Mr. Filleul that the order of the court was sufficient, and that he would at once order the woman's release. Time, however, has been given to her to prove her freedom, and also to the lawyer to prove the validity of the bill of sale.—*N. O. Picayune, Sept. 6.*

SETTING A GANDER'S LEG.—Dr. S. came to settle at Bloomfield, half a mile north of what is now Piety Hill, or Birmingham, in 1820, and commenced farming and the practice of medicine. A year or two afterwards a neighbor, as he was then called, a man who lived about eight miles off, with whom the doctor was at variance, called him about the

middle of a bitter winter night to go to his house and mend a broken leg. The doctor was never backward in obeying a professional call, and was under way in short order. Arriving at the place, he found the patient to be an old gander, who, sure enough, had a broken leg; so he set to work, made splints and bandages, put the leg in place and went home, leaving Mr. Gander as comfortable as could be expected.

In due time the owner of the gander was presented with a bill of \$10, for surgical services, which he refused to pay. Dr. S. sued him before a justice, and recovered the amount with costs. The gander appealed, or rather his owner did for him; the judgment was affirmed with new costs. The gander took another and last appeal to the Supreme Court, where the judgment below was affirmed with new costs, from which court an execution issued for \$10 damages and \$160 costs of suit, which was levied on the farm and finally paid, leaving the world in doubt which was the greater goose of the two. — *Ohio Empire*.

A SCENE IN COURT. — *Court of Exchequer* (before the Lord Chief Baron and Common Juries). — *Chard v. Birch*. — Upon this case being called on, Mr. Crosse said he represented the defendant; but he did not see the counsel on the other side present. The plaintiff said his solicitor had been in court till within the last few minutes, when he was obliged to go home from illness; and his counsel were engaged in another court, so that he had no one to appear for him. The Lord Chief Baron: "Then you are an unhappy man." The Plaintiff: "No, my lord, I am not unhappy." (Laughter). The Lord Chief Baron: "Well, then, you are unfortunate; for you are here, when your cause is entered on, without either attorney or counsel. You have a sick attorney, and your counsel are absent. I consider that an unhappy position for a plaintiff to be placed in. The usual mode of proceeding, the jury having been sworn, and your counsel not being present, would be that you should be nonsuited. I am reluctant to put you to the expense of appearing here again, therefore you shall state your own case to the jury, and then, upon being sworn, I will receive your evidence. In order to do this, I must request the learned counsel, who appears for the defendant, to read the declaration and pleas." — *Law Times*.

A MODEL "CHARGE." — The following amusing incident transpired at the spring term of the Circuit Court of St. Croix county, Wisconsin.

The Judge of the Circuit Court, lately in session at Hudson, Wisconsin, gave a charge to the jury on a certain action tried before him which excited considerable merriment in the court at the time.

The action was to recover the value of certain liquors sent from below and consigned for sale to the defendant. Evidence was given on the part of the defendant to show that the brandies, &c., were made of 40 cent whiskey, and drugged besides, whereat the judge was very indignant, and charged the jury very nearly as follows:

"*Gentlemen of the Jury*: Pure unadulterated liquor is a wholesome and pleasant beverage, and, as far as the experience of the court extends, conduces to health and longevity; but a bad article of liquor, gentlemen, or, what is worse, a drugged article, cannot be tolerated; and if dealers from below will send up into this beautiful country, so blessed with the smiles of the benignant Creator, such a miserable quality of liquor as the proof shows this to be, in this court, gentlemen of the jury, they cannot recover."

A CORONER'S VERDICT — FOUND BAD. The Portsmouth Journal, under the head of traditional sketches, publishes the following account of a model jury of the olden time.

"About eighty years ago a man came to his end by a casualty at the

Isle of Shoals, and a coroner from Portsmouth visited the island to make an inquest. Twelve jurors were summoned from those who were first met with, and directed to sit on the body. They went into the house, and soon some of them returned, and informed the coroner that he would hold but six. They were again instructed and sent in. They reported that he was drowned. They were again sent back for further investigation. In due time, they returned with the report that they had notched on one stick all his good deeds they could find, and on another, all his bad ones. The latter numbered most, and therefore they gave their verdict that he had gone to the wicked place. One of his good qualities was reported to be, that he could carry a can of flip at arm's length around the island, and not spill a drop."

LAWYERS' BEARDS. — Upon All Souls' Day, in the first year of Queen Elizabeth's reign, the judges made an order, which was imperatively enforced in all the inns of court, and gave great offence to the lawyers: "That no fellow of these societies should wear a beard above a fortnight's growth; and that none should wear any sword or buckler, or cause any to be borne after him into town."

FINIS LITIS. — The Supreme Court of Holland has just decided a case begun in 1420, respecting the boundary between two communes.

COSTS. — In an action for £9 odd, originally brought in the Glasgow Sheriff's Court, the united costs have been £220.

Notices of New Books.

PUBLIC AND PRIVATE LAWS OF THE UNITED STATES OF AMERICA, passed at the first session of the twenty-third Congress, 1853 - 1854. Carefully collated with the originals at Washington. Edited by George Minot, Counsellor at Law. Boston: Little, Brown & Co. 1854.

This edition has the stamp of authority, as an evidence that the law makers are satisfied with the clothing of their labors, and is already known as *the* edition of the laws of the United States.

The present number is unusually plethoric, but not so full of interest as of matter. It contains some two hundred and seventy-eight laws, public and private, and twenty-five resolutions, together with treaties and proclamations. By one act of practical interest to lawyers, notaries public are "authorized to take depositions, and do such other acts in relation to evidence to be used in the courts of the United States, in the same manner, and with the same effect as commissioners to take acknowledgments of bail and affidavits may now lawfully take or do."—c. 159, § 2.

An appropriation is made for codifying and revising the revenue laws, perhaps an entering wedge for a more extended system of codification. The Kansas and Nebraska Act looks out from Little & Brown's pages, as innocently as if it had been the bantling of some Arcadian Legislature, instead of that stormy assembly which raged so furiously during the long night, when it struggled into existence.

There is one singular omission in the existing criminal law of the United States, which it may not be out of place to notice here, first brought to our notice, by a recent case in the Circuit Court of the United States for the Massachusetts District. Some months since, one Henry Pease was indicted for the manslaughter of one Lopez, by ill treatment on the high seas, in consequence of which, Lopez died on land, in a foreign

port; but Sprague, J., who was then holding the court, considered this a *casus omisus* in the laws of the United States, and was of opinion that although the court had jurisdiction by statute in a case of murder, where a malicious cause of death occurring on the high seas produces death on land, yet it was otherwise as to manslaughter.

CASES IN THE CIRCUIT COURT OF THE UNITED STATES, FOR THE THIRD CIRCUIT. Reported by John William Wallace. Vol. II. pp. 616. Philadelphia: T. & J. W. Johnson, Law Booksellers, No. 197 Chestnut street.

This is a valuable addition to an American lawyer's library. We published in our last number a selection from Mr. Wallace's marginal notes, comprising several cases, of more or less interest. In one of them (*Jones v. The Ins. Co.*, p. 278,) Judge Grier was called upon to consider the same question which lately came before the English House of Lords, in *Small v. Gibson*, 18 Jur. 1131, and before the Supreme Court of Massachusetts, in *Copen v. Wash. Ins. Co.*, 16 Law Rep. p. 465, whether there is any implied warranty of seaworthiness in a time policy, and held that none is implied, except under particular circumstances, if at all. The Supreme Court of Massachusetts do not seem to recognize any circumstances, in which a warranty of seaworthiness, "in the ordinary sense of that term," can exist in a time policy. The English decision leaves the point open as to whether such a warranty may not sometimes be implied. It would seem then, that litigation on the subject was not altogether closed. We find opinions also on the Law of Copyright, Collision, Challenge of Jurors, The Fugitive Slave Law, Patents, Treason, &c.

This volume contains some interesting speeches by the Hon. Horace Binney, at meetings of the bar, "on the occasion of the deaths of Charles Chauncey and John Sergeant" — his friends and contemporaries. And in the case of *Cromwell v. The Bank of Pittsburg*, p. 569, (we quote from the marginal note,) "The history of records and of the mode of entering judgment in Pennsylvania, is given in detail, . . . and the loose and careless mode of preserving judicial papers and transacting matters of form by judges, prothonotaries, attorneys, and parties in Philadelphia, set forth."

"Usually," says Judge Grier, in his opinion, "where an agreement or acknowledgment, such as is found in this case, has been put on file, the entry made by the clerk on the rough docket, would be 'Sept. 13, 1820, judgment confessed. See paper filed with writ;' . . . And I have known one prothonotary — a very worthy man, but somewhat eccentric in his orthography — who would have made the following minute only, 'Sept. 13, Gug.''" And, an entertaining note on the case, gives the reader some idea of the manner in which records, those *absolute verities*, are sometimes kept in Pennsylvania.

It is perhaps a legitimate conclusion, from the appearance of Mr. Wallace's volume, that he or his publishers, or both, have an eye to nicety. We wish he would amend his system of nomenclature in admiralty cases. *The Barque Delaware v. The Steamer Osprey*, figures in his list. Was the barque a libellant? But we will not enter upon a topic which is elsewhere discussed in our pages, by a correspondent whose nautical and legal experience makes him an authority, and entitles him to be heard in behalf of his clients. It may be a little matter, but little matters are entitled to their share of attention.

DEDICATION OF ANTIOCH COLLEGE AND INAUGURAL ADDRESS OF ITS PRESIDENT, HON. HORACE MANN, with other proceedings. Yellow Springs, Ohio; A. S. Dean. Boston: Crosby & Nichols.

This little volume presents a very favorable specimen of Western typog-

raphy and binding. Its contents consists of a brief narration (omitting dates) of the proceedings at the Dedication of Antioch College, and at the end, a list of the Faculty, a notice of the Preparatory School, a statement of the requisites for admission to the College, and of the undergraduate course, and a short notice of the history and present state of the Institution.

The prominent feature of the book is the Dedicatory and Inaugural Address of the President, Hon. Horace Mann.

This address is very characteristic of its author. It is powerfully written, and presents striking and impressive views on the important subjects of education. We think we can discern a more sober and practical tone of mind in it, than has appeared in most of Mr. Mann's speculative writings while among us, but at the same time, the startling energy of thought and originality of views, heretofore so characteristic of him, are still preserved in all their vigor. The address does not afford sufficient information of the details of the plan of the College, to enable us to enter upon them. The principal novelty is the attempt that is to be made to educate together youth of both sexes, who have passed the term of mere childhood. It is, we believe, an almost untried experiment. If practicable at all, there are certainly some advantages to be derived from the humanizing presence of female influences, but whether it is practicable, we consider a matter of grave doubt.

We take jurisdiction of this little volume, for the purpose of introducing it to our readers, although it is in no way connected with the profession to which our journal is devoted, because the author of the address was once a distinguished member of the Massachusetts bar, and we therefore feel and claim an interest in his future course.

The object of education at the West, is one of the most important that can claim the attention of all true men, not only there, but throughout the Union; for upon the character of the vast future population of the Valley of the Mississippi will depend the destiny of this nation, and the question whether the people can be sufficiently elevated by intellectual, moral, and religious training, to continue capable of permanent self-government. We commend this address and the enterprise to the attention of our readers, and wish Mr. Mann and his fellow-laborers, all the success which their intentions and efforts may deserve.

COMMENTARIES ON THE JURISDICTION, PRACTICE, AND PECULIAR JURISPRUDENCE OF THE COURTS OF THE UNITED STATES. Vol. I.; containing a View of the Judicial Power, and the Jurisdiction and Practice of the Supreme Court of the United States. By GEO. TICKNOR CURTIS, Counsellor at Law. Philadelphia: T. & J. W. Johnson. 1854. pp. 635. 8vo.

Mr. Curtis, who amid the cares and occupations of an extensive practice, finds time always for professional authorship, has here presented to the profession a well considered and carefully prepared treatise, on a subject of general interest to the American lawyer. The judicial power of the United States, and the jurisdiction and practice of the Supreme Court, form important departments of constitutional law—a branch of law marked by the finest distinctions, and resting upon the most profound principles—which has engaged the best faculties of the best minds among us, and in which the most splendid professional triumphs have been won. It is, however, well understood by but few members of the profession; and, in general, loose and inaccurate notions prevail in regard to it; and Mr. Curtis's book will be of much service, by the clear and luminous exposition it contains of matters interesting not merely to the lawyer, but also to the statesman and the patriot.

The work is divided into two books. The first book, distributed into seven chapters, treats of the judicial power of the United States, under the

several heads of cases arising under the constitution, laws and treaties of cases affecting ambassadors, other public ministers, and consuls, cases of admiralty and maritime jurisdiction, controversies to which the United States shall be a party, controversies between two or more States, the meaning, distribution, and exercise of the judicial power.

The second book is divided into nine chapters, and treats of the jurisdiction and practice of the Supreme Court of the United States. The first chapter is upon the original jurisdiction and practice of the Supreme Court of the United States; the second, third, fourth, and fifth chapters, are upon the appellate jurisdiction of the Supreme Court with reference to the Circuit Courts, to the Circuit Court of the District of Columbia, to the State Courts, and of the special appellate jurisdiction of the Supreme Court in Florida, Louisiana, and California land claims. The sixth, seventh, eighth, and ninth chapters treat of the practice of the Supreme Court in writs of error, in equity and admiralty appeals, in cases certified on division of opinion, and in cases of original jurisdiction. There is a supplement, containing an abstract of the cases in the 15th of Howard, bearing upon the topics discussed in the main body of the work, and an appendix of rules and orders and forms.

The substance of the work has been gathered from the laws and constitution of the United States, and the various decisions of the courts of the United States in illustration thereof. The examination of these, by Mr. Curtis, has been minute, patient, and exhausting; and the results of his investigations are presented with logical method and discriminating analysis. His style is clear, precise and accurate; his grasp of legal principles is vigorous; and his statement of legal points and distinctions is luminous. In constitutional interpretation, his views are of the school of Marshall, Story, and Kent; but whenever he has occasion to express dissent from a judicial opinion or observation, it is done with that propriety and decorum which the relation between the bar and the bench so imperatively requires. The constitutional lawyer will read with peculiar interest the chapter on the appellate jurisdiction of the Supreme Court of the United States, with reference to the State Courts — the longest and most elaborate in the volume — in which the subject of the obligation of contracts and of the distinction between the obligation and the remedy of a contract is treated with great accuracy of statement and fulness of research. The chapter on the special appellate jurisdiction of the Supreme Court in Florida, Louisiana, and California land claims, will be curious and new to most of the profession, in the Northern States at least.

Mr. Curtis announces in his preface, that the second volume of his work will embrace the jurisdiction and practice of the Circuit and District Courts. We congratulate him and the profession alike, on the industry and thoroughness with which his task thus far has been completed; and when his whole plan shall have been accomplished, he will have finished a work honorable to himself and useful to his brethren.

As a specimen of Mr. Curtis's style and manner, we cite a paragraph in which he discusses the right of a State to extinguish a franchise by the exercise of the right of eminent domain — one of those points on which judges and statesmen will differ, according to the character of their minds and the political schools in which they have been trained.

"The case in which the power of a state to resume or extinguish a franchise, by the exercise of the eminent domain, was thus affirmed not to be within the provision of the Constitution of the United States respecting the obligation of contracts, was a case where the legislature of Vermont had, in 1795, incorporated a company for the purpose of building and maintaining a toll-bridge; and long afterwards, by certain proceedings under the general laws of the state, enacted in 1839, a public road was laid out between certain termini, passing over and upon the plaintiffs' bridge, and thus converting it into a free public highway; compensation being as-

sessed and awarded to them for this appropriation of their property, and for the consequent extinguishment of their franchise. The charter of incorporation had confined the plaintiffs' right of erecting and maintaining a toll-bridge to a particular spot, directing it to be where a road was directed to be re-surveyed by an act passed at the same time. It is difficult to be satisfied with the reasoning employed by any of the learned judges in this case. The ground upon which the decision was placed, by a majority of the court, was that above stated; and it rests, in substance, upon the position that, as the power of eminent domain is part of the fundamental law of the state, applicable to all property, the contract by which a franchise is created must be held to be made with reference to this known and universal power of the government, and upon the condition that it is to be exercised when occasion calls for it. But, it may be respectfully suggested that what was extinguished or taken away, in this case—the franchise itself—was the thing created by the contract, and the right to enjoy which was the thing stipulated; that the case differs from that of the Charles River and Warren bridges, in this, that in the latter case the value only of the franchise was impaired, but the franchise itself was not taken or extinguished; and that to hold that the subject-matter of its grant may be taken or extinguished by the state, under its power of eminent domain, when it cannot be resumed by the law-making power alone, without touching the obligation of the contract, is to hold that the right of the eminent domain enters into the contract, as one of its conditions, while the ordinary legislative power is excluded from it. And this we understand to be the view of the court; for it is said that the power of eminent domain is paramount to all private rights vested under the government, and, moreover, that the grant of a franchise is made with reference to it as 'an essential and inseparable condition,' growing out of the higher authority of the paramount law of the state. Now, this broad and very important question, whether and to what extent, the law of the state enters into and forms part of the obligation of a contract, by tacit reference or presumption, so as to regulate or fix the stipulations of the parties upon points on which the contract does not expressly speak, is a question that has not received so full and satisfactory an elucidation, in our constitutional discussions, as to warrant all the conclusions that may follow from a denial or affirmance of the general proposition. That the law which regulates or vests in the state the power of eminent domain, or the power itself, is of a more high or sacred character than any other law on which any of the other powers of government depend, or than those other powers themselves, so that it may be supposed to be peculiarly in the contemplation of the parties to such a grant, while the ordinary legislative power is not, it is difficult to affirm. It is difficult to see why a state can resume or destroy the subject of its grant, by a legislative act, which involves the exercise of the power of eminent domain, when it cannot do it by a simple repeal of the grant under the legislative power, upon the ground that the contract in the grant is made upon the condition that the one power may be exercised, and that the other may not be. All the powers of government are held in trust for the public, and all are equally to be presumed to be exercised for public purposes and objects. The simple repeal of a charter of incorporation, or other legislative grant, may be as much for the public convenience or necessity, as the extinguishment of the franchise by an act which takes it, under the power of eminent domain, for public uses; and when the charter is silent with regard to the exercise of both powers, it is difficult to see why one is within the obligation of the contract and the other is not, upon any notion of a tacit reference by the parties, through which the state obtains a reservation of power in one form, which it does not possess in another. The real question would seem to be, Has not the state, by creating a franchise, stipulated that it shall continue to exist and be enjoyed, as against *all* the legislative powers of government, and against all other powers, except those which rest upon the *salus populi suprema lex*? That there is a distinction between the franchise of a corporation and its property, in respect to the contract of the state and the corporators, as including or excluding any of the powers of government by its obligation, would seem to be clear, from the fact that the franchise is created by the grant, and its existence and enjoyment constitute the thing stipulated; whereas the property, however acquired, is only the means by which the franchise is exercised and enjoyed. Whether the franchise itself can be resumed, or destroyed, or extinguished, by the exercise of any merely legislative power, whether in the right of eminent domain, or in any other mode of promoting the public convenience, must depend, it is suggested, upon the great question, how far and in what sense the existing law, whether fundamental, natural, or positive, enters into a contract. A further discussion of this and some of the other questions involved, might, it is conceived, lead to other conclusions as to the power of a state to take for public uses the franchise of a corporation, than those which at present constitute the doctrine of the court."—§ 250.

Insolvents in Massachusetts.

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Commissioner.
Bacon, Albert K.	Ware,	Sept. 27, 1854.	Haynes H. Chilson.
Bailey, Edmund C.	Springfield,	" 25,	Henry Vose.
Beale, Wm.	Boston,	" 2,	John P. Putnam.
Bird, Edward B.	Stoughton,	Oct. 7,	Samuel B. Noyes.
Bond, Emilius	Falmes,	" 14,	Henry Vose.
Boston Carpet Company	Roxbury,	Sept. 4,	Francis Hilliard.
Briggs, John R.	Springfield,	Oct. 10,	Henry Vose.
Brown, George W.	Stoughton,	Sept. 16,	Samuel B. Noyes.
Brown, Wm. F.	Southbridge,	" 27,	Alexander H. Bullock.
Buller, Edwin	Springfield,	" 30,	Henry Vose.
Clarke, Eugene	Quincy,	" 18,	Francis Hilliard.
Drew, George A.	Boston,	" 4,	John M. Williams.
Edgarton, Wm. W.	Shirley,	" 2,	Isaac S. Morse.
Fales, Levi S.	Chelmsford,	" 2,	Isaac S. Morse.
Fitts, Abraham	Worcester,	" 4,	Alexander H. Bullock.
Foster, Wm.	Danvers,	" 26,	John G. King.
Foxcroft, Isaac C.	Dedham,	" 26,	Samuel B. Noyes.
Franklin, J. D.	Wrentham,	" 19,	Francis Hilliard.
Fulton, James K.	Roxbury,	" 11,	Francis Hilliard.
Gay, Charles	Stoughton,	" 25,	Samuel B. Noyes.
Glover, George W.	Adams,	" 18,	Shepard Thayer.
Gould, Charles P.	Salem,	" 21,	John G. King.
Granger, David A.	Charlestown,	" 8,	Asa F. Lawrence.
Ingerson, Nathaniel	Lowell,	" 21,	Isaac S. Morse.
James, Nathan P.	Chicopee,	Oct. 7,	Henry Vose.
Kern, Martin L.	Sandwich,	Sept. 25,	Timothy Reed.
Ladd, J. I.	Groveland,	" 20,	John G. King.
Lloyd, Elijah	Blandford,	Oct. 12,	Henry Vose.
Locke, Elbridge G.	Lexington,	Sept. 5,	Asa F. Lawrence.
McCaskell, John	Boston,	" 5,	John P. Putnam.
Mead, John A.	Stoughton,	Oct. 2,	Samuel B. Noyes.
¹ Milady, Michael	Roxbury,	" 6,	Samuel B. Noyes.
Minot, Willard	Lowell,	Sept. 5,	Isaac S. Morse.
Morse, Russell W.	West Bridgewater,	" 5,	Welcome Young.
Nelson, Myron E.	Coleraine,	" 30,	David Aiken.
Nichols, Alvin	Barnardston,	" 26,	David Aiken.
O'Connor, Thomas	Roxbury,	Oct. 6,	Samuel B. Noyes.
² Perkins, John J.	Dana,	Sept. 23,	Alexander H. Bullock.
Pillsbury, Aaron N.	Georgetown,	" 1,	John G. King.
² Procter, Samuel	Essex,	" 23,	Alexander H. Bullock.
Ricketson, Saml. G.	Roxbury,	" 7,	Francis Hilliard.
Rogers, Timothy B.	Boston,	" 9,	John P. Putnam.
Searl John H.	Lowell,	" 4,	Isaac S. Morse.
Skinner, Bridget A.	Boston,	" 6,	John P. Putnam.
Small, Joshua	Harwich,	" 19,	Timothy Reed.
Spring, Edward	Boston,	" 9,	John P. Putnam.
Thompson, Cyrus H.	Fitchburg,	" 19,	C. H. B. Snow.
Thornton, William	Grafton,	" 30,	Alexander H. Bullock.
Tyler, John S.	Boston,	" 16,	John M. Williams.
Washburn, David	Natick,	" 12,	Asa F. Lawrence.
West, Daniel	Lowell,	" 18,	Isaac S. Morse.

¹ Milady & O'Connor.² John J. Perkins & Co., business at Dana.

In the list of insolvents in our October Number, for "Sept. 6," in the 9th line of dates, read "Sept. 5;" for "Walter A. Henderson," read "Walter, O.;" for "McKenree," read "McKenna;" for "Merrill, Lewis Jr." read "Lewis F."

The commissioners will confer a favor on those who have occasion to refer to this list, by making their returns as legible as possible.

THE
MONTHLY LAW REPORTER.

DECEMBER, 1854.

ON THE SOURCE OF THE MARITIME LIEN.¹

IN some former papers in this Magazine,² an attempt was made to elucidate and define the peculiar properties of that *jus ad rem* called the maritime lien, such as they exist in the theory of English law.³ But although a reference was made to Rome as the undoubted parent of that lien, the writer of those papers did not point out the textual sources from which a legal principle, so remote as that is from all native forms, at the same time that it is so refined and equitable in its idea, and so beneficial in its operation, has been imported into the juridical system of this country. This explanation we propose to give.

The laws of every nation, even in the earliest stages of its civilization, have ever upheld acts coming within the strict and literal sense of *hypothecation* — acts wherein the express agreement of an owner binds property to the performance of a pecuniary engagement. Mortgages and bottomry-bonds are familiar instances amongst ourselves of such a principle. But the Imperial Law went further: it gave to many acts the effect of an implied hypothecation, corporally binding a *res*, though no words of convention and obligation had been expressed, and no possession had passed; thus itself protecting the interests of a creditor

¹ From The Law Magazine, (London,) for August, 1854. Vol. 52, No. 104.

² For these papers, see 15 Law Rep. 555 and 16 Ib. 1.

³ Vol. xlviii., p. 211, and vol. xlix., p. 143.

whose innocent negligence had failed to obtain for himself a due guarantee.¹

This species of debt was called *hypotheca tacita*, or an unexpressed hypothecation. Debts of such a quality were separated from the general body of liabilities, and were elevated into a distinct class, some of them affecting the whole, while others affected specific portions only, of the debtor's estate; and all personal actions yielded the supremacy to them.²

For such a distinction, it is obvious that a moral superiority in the nature of the debt could be the only foundation; and accordingly we find that debts which concern the general interests of humanity—such as funeral expenses—were by the operation of law made a charge upon the entire estate of the deceased, the same as if an actual hypothecation in that respect had taken place.³

By a like principle of moral right, the landlord of a farm let to a tenant, had a specific charge upon its crops, and excluded all other creditors from participating in fruits which his property had called into existence.⁴

So also the landlord of a town-house had a lien on his tenant's *invecta et illata*, (or furniture,) by a species of compensation for the use which the tenant had had of the habitation.⁵

Another application of the same equity gave a lien upon a specific *res* in cases where the creditor had lent the debtor the money required, either to buy it or to restore and improve it. Accordingly, where a creditor had advanced to his debtor the purchase-money of a house after-

¹ Dig. lib. 20, tit. 2; lib. 13, tit. 7, § 9. This is the tacit hypotheca. *Pignus* and *hypotheca* are often used indiscriminately in the Roman law (Cf. Calvin Lex. Jurid.) Strictly speaking, there was this practical difference between them: in the former, the creditor had possession of the *res*, with a legal interest or charge upon it; in the other, he had the legal interest or charge only, without the possession; but this made very little real difference, as the courts would always enable him, when necessary, to obtain possession of the *res* by vindication.

² Cod. lib. 8, tit. 18, s. 9. "Eos qui acceperunt pignora, cum in rem actionem habent, privilegiis omnibus quæ personalibus actionibus competunt, præferri constitut.".

³ Dig. lib. 2, tit. 7, s. 45. "Impensa funeris semper ex hæreditate deducitur, quæ etiam omne creditum solet præcedere, cum bona solvendo non sint."

⁴ Dig. lib. 20, tit. 2, s. 7. "In prædiis rusticis fructus, qui ibi nascuntur, tacite intelliguntur pignori esse domino fundi locati, etiamsi nominatim id non convenerit."

⁵ Dig. lib. 20, tit. 2, ss. 4, 6; *ibid.* s. 3. The sense of justice which pervades Roman law made a lodger liable only for his own hire to the superior landlord; and for that only when he had not paid his own immediate landlord. Dig. lib. 13, tit. 7, s. 11. "Plane in eum dumtaxat summam invecta mea et illata tenebuntur, in quam cœnaculum conduxit. Non enim credibile est hoc convenisse, ut ad universam pensionem insulæ frivola mea tenerentur."

wards bought by the latter, or had either, as a tradesman, repaired or rebuilt it, or had paid the builder or contractor his bill for so doing,¹ such creditor was considered to have lent or expended his money *sub hypothecâ*, and the law stepped in to his assistance, and, by giving him in each case an hypothecal charge upon that specific *res* which his own money had in the one case made the debtor's property, and in the other cases had given to it an accretion of value, prevented concurrent creditors from reaping an unmerited advantage at his expense, and from deriving a profit through his loss.

The foregoing remarks will have been sufficient to show the existence, amongst the Romans, in integrity and expansion, of that principle of a secret interest in a thing, unevidenced by written title, such as we have only in a partial and fragmentary form, viz., in the Admiralty; in which court all the debts and demands suable, with the exception of bottomry and damage, come strictly within the definition of that tacit hypothec which we last instanced.

It appears sufficiently clear, without the dreary necessity of going into the archæology of the court, that the Admiralty on its creation, (at whatsoever epoch that occurred,) was empowered and directed to determine its peculiar questions according to the principles of the Civil Law. Under these circumstances, it found no difficulty in classifying the debts and claims, submitted to its decision, under the head of hypothecal charges, express or tacit.²

Bottomry came clearly under the one, and wages, salvage, towage, and pilotage, as clearly came under the other head,

¹ Dig. lib. 20, tit. 2, s. 1. "Pignus insulæ creditori datum, qui pecuniam ob restitutionem ædificii extruendi mutuam dedit. Ad eum quoque pertinebit qui redemptori, domino mandante, nummos ministravit."

² The curious reader, who has cast his eyes over the miserable compilation which passes by the name of Clerke's *Praxis*, must have been surprised at the total silence observed by that jejune writer upon the subject of the hypothec or maritime lien. There is, (strange to say,) in that singular book no allusion whatever to such a principle of law. The arrest of the debtor's goods is mentioned in such terms, as show that, according to the writer's views, arrest was no other than a distress made in order to compel the appearance of the owner, not the legal enforcement of an *hypotheca*. The proceeding by arrest of the defendant's person is laid down as the only strict form of procedure, the other being exceptional and applicable solely to those cases where the defendant, by absconding, has rendered a personal suit impracticable. It is absolutely incredible that this could ever have been the state of the law in that writer's supposed age (viz., the reign of Elizabeth,) it being inconsistent with the fact, that the Civil Law was the fountain of the Admiralty jurisprudence, and also, that from the time of the Commonwealth, the hypothecal principle has been applied by the Court, without a doubt on its own part, or a question on the part of others.

inasmuch as services had been actually performed to the ship and cargo.

But the Admiralty must have felt some difficulty, when the ground was new and unbroken, in making damage a hypothec upon the wrong-doing vessel and her freight.

By the Roman law, damage arising from the collision of vessels at sea, gave the right only of a personal action, as in the case of any other *damnum*.¹

The Admiralty, however, whilst it retained the personal liability of the owner and master of the *res* by the instrumentality of which the injury had been done, at the same time extended the *obligatio* to the *res* itself; thus enlarging the bounds of the *hypotheca* in a manner that the Romans, if they had been a maritime and commercial people, would have appreciated and admired. The propriety of the mode equalled the adequacy of the means of satisfaction which the imposition of the *obligatio* upon the wrong-doer's vessel afforded.

The Admiralty having thus adopted the hypothecal idea as the rule of its proceeding, applied to it the principles which regulated it in the Civil Law.

The properties of the English maritime lien have been explained at some length in the papers to which we referred, and those properties of the hypothec only which correspond to them need explication.

Like the lien, the hypothec was unaffected by the vicissitudes of the *res obligata*. Into whosoever hands the latter passed, by a voluntary sale or assignment of the debtor, the creditor being unsatisfied, had a right to follow it; for that sale, being made without the consent of the creditor, only transferred the ownership with the burthen of the same obligation.²

The Admiralty has admitted an exception to this rule in the case of cargo. The hypothec upon that is enforced so long only as it continues to appertain to the owner whose

¹ Dig. lib. 9, tit. 2, s. 29. "Si navis tua impacta in meam scapham, damnum mihi dedit, quæsitum est, quæ actio mihi competere? Et ait Proculus, si in potestate nautarum fuit, ne id acciderit, et culpa eorum factum sit, Lege Aquilia cum nautis agendum," etc. It must have been in allusion to this that the Reporter (in the Volant) made Dr. Lushington observe: "Damage confers no lien upon the ship." 1 W. Rob. 397.

² Dig. lib. 13, tit. 7, s. 13. "Si fundus pignorat us venierit, manere causam pignoris; quia cum sua causa fundus transeat," etc. Cod. lib. 8, tit. 28, s. 12. "Si debitor rem tibi jure pignoris obligatam, te non consentiente distraxit, dominium cum sua causa transtulit ad emptorem." Cod. lib. 8, tit. 26, s. 10. "Res pignoris hypothecæ jure creditoribus obnoxias, citra consensum eorum debitores alienantes, præcedentem non dissolvunt obligationem."

property it was at the time of the creation of the lien. But if it has been subsequently sold and delivered to other persons, the Admiralty, from reasons of policy, or from the impossibility of detecting and identifying it after its dispersion and change, considers the lien to be obliterated, or at least so treats it, and only assists the suitor by a personal proceeding against the original owner.¹

A sale at the instance of the creditor had the effect of releasing the *res* from all incumbrances,²—his own and others'.³

Should the creditor have consented to the sale of the *res*, he was held to have lost his hypothec, provided, however, that consent was an act done by him, explicitly showing knowledge of the approaching sale, and an intention on his part to further it.⁴

By the English law, consent freely given and clearly expressed would be equally a bar, by the rule "*volenti non fit injuria*." The case of the *Repulse* established only that mere privity or knowledge of an intended sale, and at most a non-dissent, could not operate as such.⁵

This leads us to a consideration of the modes by which the hypothec was extinguished and satisfied; and we shall find that the same rules which regulate the lien in these respects were originally applied to its Roman prototype.

Simple payment and satisfaction (or something in lieu of, and, in the creditor's estimation, equivalent to payment) were the only modes of exonerating the *res obligata*.⁶

But though the debt were paid, it did not follow that the hypothec would be released; for if, at the same time, interest and costs were due and left unpaid, the hypothec

¹ If a valuable portion of a cargo could be traced and identified, however, (*e. g.* the *Kob-i-noor*), it cannot be supposed but that the hypothec would attach.

² Dig. lib. 20, tit. 5, s. 13. "Creditor qui jure suo pignus distraxit, jus suum cedere debet."

³ Cod. lib. 8, tit. 20, s. 1. "Si vendidisset qui ante pignus accepit, persecutio tibi hypothecaria superesse non posset," etc.

⁴ Dig. lib. 20, tit. 6, s. 7. "Si consensit venditioni creditor, liberatur hypotheca." *Ibid.* s. 8. "Non videtur autem consensisse creditor si sciente eo debitor rem vendiderit, cum ideo passus est venire, quod sciebat ubique sibi durare. Sed si subscripserit forte in tabulis emptionis, consensisse videtur, nisi manifeste appareat deceptum esse. Quod observari oportet et si sine scriptis consenserit."

⁵ 4 Notes of Cases, 172.

⁶ Dig. lib. 20, tit. 6, s. 6. "Item liberatur pignus, sive solutum est debitum, sive eo nomine satisfactum est." Dig. lib. 13, tit. 7, s. 9. "Satisfactum autem accipimus quemadmodum voluit creditor, licet non sit solutum, sive aliis pignoribus sibi cavere voluit, ut ab hoc, recedat; sive fidejussoribus, sive reo dato, sive pretio aliquo, vel nuda conventionem nascitur pignoratitia actio; et generaliter dicendum erit, quoties recedere voluit creditor a pignore, videri ei satisfactum, si ut ipse voluit sibi cavit, licet in hoc deceptus sit."

endured until they were discharged also.¹ This is true of the maritime lien.

If the hypothec bound many *res*, none of them were released until the whole debt was paid.² So in our English maritime law, a ship, cargo, and freight, however sufficient each of them may separately be for the payment of the debt, are all liable as a security to the debtor,³ until full payment has been actually made.

If the *res obligata* were lost, the hypothec became extinguished also.⁴ So no action lies in the Admiralty in support of a lien, where the ship has disappeared from existence.

If the personal security of bondsmen were given and accepted in lieu of payment, the hypothec was held to be satisfied.⁵ This is the every-day practice of the Admiralty on taking bail to its actions *in rem*.

If a *novatio*, or fresh security, of the like or different nature, were substituted with the consent of the creditor, the same legal satisfaction was effected.⁶ So in the Admiralty it was held, where a mate of a vessel had been tendered his full wages in cash, but (as he was desirous of remitting money to England), the ship's agent at Calcutta had given him a bill for part of them on the owners in London, who became bankrupts, and refused payment, the court held that the man had accepted a *novatio*, or new security, which released the lien: for the court said:

"It is pleaded that this man might have taken his wages at Calcutta, but that, instead of the money, he preferred a bill of exchange, as an accommodation to himself: he then made his election, and must stand by the risk."⁷

In all these points, we find in the Roman hypothec a perfect correspondence with the rules of our own Admiralty in regard to the maritime lien.

¹ Dig. lib. 10, tit. 2, s. 14. "Nisi universum quod debetur offeretur, jure pignus creditor vendere potest." Cod. lib. 8, tit. 29, s. 2. "Nam si vel modicum de sorte, vel usuris indebito perseveret, distractio rei obligatæ non potest impediri." Dig. lib. 13, tit. 7, s. 8. "Cum pignus ex pactione venire potest, non solum ob sortem non solutam venire poterit, sed ob cætera quoque, veluti usuras et quæ in id impensa sunt."

² Dig. lib. 20, tit. 1, s. 19. "Qui pignori plures res accepit, non cogitur unam liberare, nisi accepto universo quantum debetur."

³ Bonaparte, 7 Notes of Cases, Supp. 55.

⁴ Dig. lib. 20, tit. 6, s. 8. "Sicut re corporali extincta, ita et usufructu extincto pignus vel hypotheca perit."

⁵ Vide *ante*, in note.

⁶ Dig. lib. 13, tit. 7, s. 11. "Novata autem debiti obligatio pignus perimit." Dig. lib. 46, tit. 2, s. 18. "Novatione legitime facta, liberantur hypothecæ."

⁷ William Money, 2 Hagg. Ad. Rep. 136.

But the resemblance is still more close and exact when we consider the application of that surprising inversion of rule under which competing liens are classified and arranged in the Admiralty.

When the claims of hypothecal creditors against the same *res* met and clashed with each other, it would be obvious that some principle of preference was required to be elaborated by the law. The principle of that preference, which the Romans called *privilegium*, was established upon a similar basis to that which had constituted the hypothec itself: as that appropriated to itself a preference over debts otherwise constituted, on the ground of benefit to the *res*; so the hypothec, which had conferred the latest benefit, assumed the superiority over all earlier incumbrances. For as such a creditor's loan inured to preserve the thing in being for the common benefit of proprietor and creditors, it became, as it were, that creditor's own property to the extent of the value which he had laid out upon it. "*Salvam fecit totius pignoris causam.*"¹

This may be clearly exemplified from the Roman law. Money lent and expended for the purchase of a house, was, as we have seen, a hypothec upon that house; but the costs of subsequent repairs, or money afterwards lent and expended upon repairing it, gave to the creditor, as in equity it ought, a *privilegium*, or preference over the other hypothecary creditors.

Along with the *hypotheca*, the Admiralty borrowed also the proceeding *in rem* to enforce it. This was the *actio hypothecaria*, or *hypotheca persecutio*, of the Romans, — a process identical with the *rei vindicatio*, being a direct action *in rem corporalem* analogously to that by which a party pursued or claimed what was more strictly his own property. The hypothecal proceeding was, therefore, also (and more frequently) called a *vindicatio*.²

¹ Dig. lib. 42, tit. 5, s. 32. "Privilegia non tempore æstimantur, sed ex causâ." *Ibid.* lib. 20, tit. 4, s. 5. "Interdum posterior potior est priori. Ut putâ; si in rem istam conservandam impensum est, quod sequens credidit. Veluti si navis fuit obligata, et ad armandam eam rem et reficiendam ego credidero." *Ibid.* s. 6. "Hujus enim pecunia salvam fecit totius pignoris causam, quod poterit quis admittere, et si in cibaria nautarum fuerit credijum, sine quibus navis salva pervenire non poterit. Item si quis in merces sibi obligatas crediderit, vel ut salvæ fiant, vel ut naulum exsolvatur, potentior erit, licet posterior sit." The pregnant text (*salvam fecit, &c.*) has been pointed out by Mr. Serjeant Shee in his admirable work on Shipping, 9th edit. 1854, pp. 133, 545, but the sterner requirements of his great task have not of course permitted him to deviate further into the regions of Roman antiquity.

² Instit. lib. 4, tit. 6, s. 4, &c.; Cod. lib. 8, tit. 14, s. 18.

The creditor who had a hypothec, in the first instance, pursued the thing, and if the *dominus* did not appear, or had no legal bar to propose, the possession of it was adjudged to him by the *præses provinciæ*.¹ The creditor could not take possession of the *res* out of the debtor's hands by his own authority. If the owner did not appear, the Roman judge, whilst decreeing possession of the *res* to the creditor, reserved the principal question; or, in other words, gave no judgment on the merits of the case.²

This is much the same proceeding as that which the Admiralty uses. In that court, in the cases where the owner does not appear to the warrant which has arrested his property, the plaintiff obtains no decree upon the merits (or principal question), but he is merely and solely decreed to be put into possession of the *res* by the *primum decretum*,³ as a first step towards dispossessing the owner of his property.⁴ This proceeding the court subsequently follows up by a sale of the *res*, and by making payment to the debtor of his debt out of the proceeds of such sale. But it is otherwise where the owner appears, though without bailing the *res*. Here the plaintiff, as the case is contested on its merits, obtains a decree, and the *res* is condemned. By the Roman law, the plaintiff might, as in our own, give up his right of an hypothecal action, and content himself with personal proceedings against the *dominus rei*.⁵

But there is a peculiarity in Admiralty practice which the Romans do not appear to have attained. It would seem by that practice, that a plaintiff may take proceedings *in rem* and *in personam* at the same time and in the same action, though it admits of doubt how far this is legal.⁶

¹ Cod. lib. 8, tit. 28, s. 14. "Si in hoc, quod jure tibi debetur, satisfactum non fuerit, debitoribus res obligatas tenentibus, aditus præses provinciæ tibi distrahendi facultatem jubebit fieri." *Ibid.* tit. 14, s. 3. "Creditores qui non reddita sibi pecunia conventionis legem ingressi, possessionem exercent, vim quidem facere non videntur: attamen auctoritate præsidis possessionem adipisci debent." *Ibid.* lib. 4, tit. 24, s. 11. "Nec creditor citra conventionem, vel præsidalem jussionem, debiti causâ res debitoris arbitrio suo auferre potest."

² A rescript of Constantine, Cod. lib. 3, tit. 19, s. 2, directs that on the *dominus possessionis* not appearing on citation, the "judex negotium summam discutiens, in possessionem rerum actorem mitti non differet, omni allegatione absenti de principali questione servata."

³ Brown's Civil Law, vol. ii. pp. 22, 23.

⁴ This act of dispossession is thus commented upon by Lord Stowell, Tobago, C. Rob. 222: "The person advancing money or bonds of this nature, (i. e. bottomry) acquires by that act no property in the vessel; he acquires the *jus in rem*, but not the *jus in re*, until it has been converted and appropriated by the final process of a court of justice. The property of the vessel continues in the former proprietor, who has given a right of action against it, but nothing more."

⁵ Cod. lib. 8, tit. 14, s. 8. Hope, 3 C. Rob. 215, and Trelawny, 216, in note; Meg. Merrilies, 3 Hag. 356. But see also Rapid, *ibid.* 422.

⁶ The *Formulare Instrumentorum*, or collection of processes in the Admiralty

With greater appearance of law, a late Judge of the Admiralty, in a case where there was a deficiency on the part of the condemned vessel to satisfy the amount of the damage and loss, issued and enforced a monition against the master and part owner, who had defended the action, to pay the difference between the value of the *res* and freight, and the damage done, he being responsible for the full amount of damage under the statute.¹

The present Judge of the Admiralty has since overruled this decision, holding, that where the warrant is against the ship, the owners are only called upon to answer with respect to any right, title, or interest they have in the vessel; and when they appear, they intervene for their interest in the vessel, and no further.² He has also said, "To render the master, — being a part owner, and being guilty of neglect or privy to misconduct, — responsible," (*i. e.* personally, beyond the value of the ship and freight,) "you must sue him as master in the first instance; or perhaps you might sue him as part owner."

It seems, therefore, that, by the law of the Admiralty, though the real and personal actions may be conjoined in one, a personal proceeding may not be engrafted on an action *in rem*.

OPINION OF JUDGE TROWBRIDGE.

WE are indebted to a descendant of Judge Trowbridge for the following valuable opinion upon a subject of no little interest, in the real property law of Massachusetts. We are not aware that it has ever been published *in extenso*, although it would seem to be referred to in the case of *Thatcher v. Omans*, 3 Pick. 521 – 528, where the deed here considered by Judge Trowbridge received a judicial construction by Chief Justice Dana, by whose father, Richard Dana, Esq., we believe it was drawn. It is, perhaps, to this opinion also, that C. J. Parsons refers in *Fowler v. Shearer*, 7 Mass. 14, 20, and to which allusion is made in the case of *Durant v. Ritchie*, 4 Mason;

Court, printed under the direction of Sir James Marriott (1802), gives us the form of an action against the ship and the master. Browne, vol. ii. p. 154, and in note, speaks of a similar action, and also of an action against the ship and owner.

¹ Triune, 3 Hagg. Adm. R. 114.

² Hope, 1 W. Rob. 158; and Volant, 1 Notes of Cases, 509.

45. The authority and learning of Judge Trowbridge were so great, that we are glad to have an opportunity to preserve this paper.

OPINION.

MOSES GILL and SARAH his wife, being of full age and seized in fee in her right of several messuages and tracts of land in the counties of Worcester and Plymouth, by their deed, signed, sealed, and acknowledged by them before a Justice of the Peace and recorded at length in the Registries of those counties, in consideration of the marriage between them, had, and for the settlement of the same messuages and lands to the uses in the deed after mentioned, and also in consideration of 20s. lawful money paid them by John Scott, grant, bargain and sell, the messuages and lands aforesaid to the said John Scott, to have and to hold the same to him and his heirs forever, to the use and behoof of the said Moses Gill and Sarah his wife and their heirs and assigns forever, and the heirs and assigns of the longest liver of them forever. After which the said Sarah dies, and a question has arisen, whether any estate in the messuages and lands aforesaid was by that deed conveyed to the said Moses Gill, and if any, what estate it was?

And upon consideration of the deed, and the laws respecting such conveyances, I am *clearly* of opinion, that the messuages and lands aforesaid did pass by that deed, and the statute of uses, to the said Moses and Sarah and their heirs as joint-tenants in fee, and that upon her death, the entire tenancy remains to the said Moses and his heirs in fee.

For although by common law husband and wife cannot convey her real estate in England, unless by fine or recovery in the King's Court; 11 Co. 77, a; Hob. 225; 2 Inst. 673; 2 Bac. 527; yet they may by custom in some places there do it otherwise; Hob. 225; 2 Inst. 673; Dyer, 363. And here it may be done by deed so made, acknowledged, and recorded, as this is. For the Province Act of 9 Wm. 3, expressly provides, "That henceforth all deeds or conveyances of any houses or lands within this Province, signed and sealed by the party or parties granting the same, having good and lawful right or authority thereto, and acknowledged by such grantor or grantors before a Justice of the Peace, and recorded at length in the registry of the county where such houses or lands do lie;

shall be valid to pass the same, without any other act or ceremony in the law whatsoever."

The words of this act are general, and extend to all deeds of conveyance made by any person or persons "having good and lawful right or authority thereto," that is, to grant houses or lands in the Province. An infant has no right to convey his real estate, nor has a wife a right to convey her estate alone; but husband and wife of full age have a right to convey her estate by fine, and it binds them and their heirs; 10 Co. 43 a; 1 Roll. Abr. 347; 2 Roll. Abr. 20; Dyer, 290, 61; 2 Co. 57; but if she was under age when the fine was levied, it may for that cause be reversed; 3 Lev. 36. Before the wife's estate is conveyed by fine, she is to be privately examined by the Chief Justice of the Court of Common Pleas, or by others specially impowered by writ out of Chancery to examine her, whether she doth it freely or by compulsion; Litt. § 670; 10 Co. 42 b. 43 a; 2 Inst. 515, 673; 2 Bac. 527; Cro. Eliz. 469; which would be vain and idle if she and her husband had no right to convey her estate by fine if she was free and willing to do it. And, as husband and wife may by custom in London, and other places, convey her estate otherwise than by fine or recovery, if they are of age, and, upon her being examined, it appears she doth it freely, 2 Inst. 673, they must be supposed to have a right to convey her estate, if both of them are of full age, and willing to do it. The mode of conveyance is different in different places; but their right to convey is alike in all, and they have the same right to convey her estate *here* as *there*, though the manner of doing it be different; and though she be not so examined here as she usually is there; for although a fine for conveying the wife's estate ought not to be received, if she be not examined, and does not freely assent, yet if it be received and recorded it will bind her and her heirs; 2 Inst. 515; 1 Bac. 301 N; 2 Bac. 527 N. And, in conveyances of the wife's estate by common recovery, her examination is so far from being thought *necessary*, that she is not *usually* examined; Style, 320; 1 Sid. 11, 322. It is plain, therefore, that in England the wife's estate may be conveyed by her and her husband, and that it may be done without her being privately examined whether she does it freely or not. And if so, surely it may be done here without that ceremony; not only because we have no Chief Justice of the Common

Pleas, nor any such writ out of Chancery, nor any law, usage, or custom, empowering any person or persons to take her examination, or to issue writs for that purpose; but because all persons that have a right to convey any real estate here, may by force of the Province Act aforesaid, do it by deed so made, acknowledged, and recorded, as this is.

This Province Act has always been understood to extend to conveyances made by husband and wife of her estate, and they have accordingly conveyed the wife's estate by deed so made, acknowledged and recorded, as this is, ever since that act was made. And a very great, if not the greatest part of the real estate on Massachusetts Bay, is held mediately or immediately under such conveyance of the wife's estate, so that they are become common assurances, and for that reason, if there was no other, are binding, and not to be shaken; 2 Bla. 333; Style, 320; 1 Wilson, 73.

The settlement of the husband's estate on his wife, and so of her estate on him, has most commonly been made here by two several deeds of bargain and sale in common form; but this has been usually done by the advice of such persons as did not know how to do it by one deed. However, such settlements of the wife's estate have been held good upon the supposition that the husband and wife had a right to convey her real estate to a stranger by deed; and if they have that right, surely they must also have a right by deed to convey it to their own use.

But as husband and wife are one person, in consideration of law, he cannot by deed made to his wife, convey his estate to her, but may convey it to a third person to her use; 1 Inst. 112 a. So husband and wife cannot convey her estate to him, or themselves directly, but may convey it to a third person, to the use of the husband only, or to their joint use. (This is done in England usually by fine or recovery. See the form of such fine: 2 Bla. Appx. No. II, and 2 Bla. 364, and the note and deeds to read or declare the uses, 2 Bla. 363.) And both may be done here by deed, and better by *one* deed than by *two*. For when land is granted to A. and his heirs to the use of B. and his heirs, the land by such grant, and the operation of law, is conveyed to B. in fee; — provided he be a person capable of taking such an estate, and A. of standing seized to such

an use, and that the grant is made upon a *good or valuable* consideration, by him or them that had a right to make it, because in such case an use arises to B. That is, B. has a right in equity to the profits of the land, and by the statute of 27 Hen. 8, called the Statute of Uses, the possession is united with the use in B., that is, possession of the land is given by that statute the instant the grant is made to B., who has the equitable right to take the profits, and thereby B. becomes complete owner of the land as well at law as in equity ; 2 Bla. 332, 333, 363, 364.

In the present case Moses Gill and his wife were capable of taking a joint estate in fee in the messuages and lands. J. Scott was capable of standing seized thereof, to the uses in the deed mentioned. The grant was made upon a good and valuable consideration, by M. Gill and his wife, who had a right to make it. They were of full age, and seized in fee of the messuages and lands in her right, and therefore had a right to grant the same. The grant was made as well in consideration of their marriage had, and for settling her estate on themselves, as for twenty shillings lawful money paid them by Scott, which is sufficient to raise the use in the deed mentioned.

Marriage is a present, continuing consideration ; 1 Danv. 37 ; 2 Leon. 224, 225 ; Cro. Eliz. 741, (16). Marriage to be had is a good consideration to raise an use ; 2 Cro. 168 ; 2 Roll. Abr. 786, 10 ; Dyer, 235. Marriage already had will raise an use to the wife out of the husband's estate, and a limitation of an estate by the husband to his wife imports a consideration, without any express words of consideration ; 7 Co. 40, *Bedell's Case*. For the same reason, marriage already had, and the settlement of the wife's estate on her husband, are good considerations to raise an use to the husband out of the wife's estate—love and affection being alike implied in both cases ; and therefore the messuages and lands would have passed by this deed considered as a covenant to stand seized to the uses therein mentioned ; *Crossing v. Scudamore*, 2 Lev. 9 ; 1 Vent. 137 ; 1 Mod. 173 ; if there had been no valuable consideration mentioned in the deed, or that could have been truly averred ; for then the estate could not have passed by this deed considered as a bargain and sale ; 1 Co. 176, a, *Mildmay's Case*. But as there is a pecuniary consideration expressed in the deed, the messuages and lands may well pass by it considered as a bargain and sale ; for any sum of

money paid or secured to be paid is sufficient to raise an use.

In the case of Sutton's Hospital, on a bargain and sale of Charter House and thirty acres of land, which, for the importance of the cause, was adjourned from the King's Bench into the Exchequer Chamber, to be argued before all the judges; it was held, that the preservation in the deed of a rent of twelve pence to Sutton and his heirs, was a good consideration for the making the grant; 10 Co. 34, a. And afterwards in the case of *Barker v. Keat*, in the Common Pleas, a reservation of a pepper-corn rent to be paid in six months on demand, in a deed of bargain and sale to make a tenant to the *præcipe* in a common recovery, was held a good consideration for that purpose; though such tenant must be actually seized of the freehold, or the recovery is not good; 2 Mod. 249; 3 Ibid. 387; 2 Bla. 362. Five, ten, or twenty shillings lawful money, is oftentimes inserted as the only consideration in deeds of bargain and sale drawn by the best conveyancers in England, and sometimes they are made in consideration of a certain sum of money, without saying how much, and held good; 2 Mod. 251; 2 Bla. Appx. No. II.; 1 Leon. 170; 1 Bridgman's Conv. 33, 83, 171, 203, 578, 280; 2 Bridg. Conv. 121, 454, 334, 456; Lill. Ent. 190, 195, 6. And M. Gill and his wife having by this deed acknowledged that one consideration which moved them to make it, was twenty shillings lawful money paid them by John Scott, the law will not allow her heirs to say the contrary; 1 Bac. 276; Moore, 570; Dyer, 169; Salk. 286; 1 Leon. 170; though creditors or *bonâ fide* purchasers may do it; 1 Keb. 770; 1 Salk. 286.

John Scott, like tenant to the *præcipe* made by deed for a common recovery, is a mere instrument for one purpose of form only, has none of the estate left in him, his wife is not entitled to dower, nor can he do any thing to affect any of the messuages or lands, 2 Bla. 333, 363, 364; 1 Bur. 117, any more than if he had not been named in the deed. Whereas in settling the wife's estate on her husband, or on themselves, by two separate deeds of bargain and sale in the common form, the first grantee's wife is not only entitled to dower, but he may encumber the estate, or it may be attached for his debts, unless both deeds could be considered as but one conveyance of the wife's estate to the use of the husband, or to their joint use; and if

they can, and are to be so considered, surely the conveyance had much better be made in a legal and regular manner by one deed, evidently made for that purpose, as that would be attended with less expense, and no risk of dower, or other incumbrance.

Deeds of conveyance to uses are, and ever since the Statute of 27 Hen. 8, made for transferring uses into possession, have been legal, as well as *common* assurances in England, 2 Bla. 332, 333; and are, and ever since the first settlement of this country, have been *legal* assurances *here*, though not so *common* as *there*. And husband and wife may, and ever since the making of the Prov. Act of 9 Wm. 3. at least, might, by such deed lawfully convey her estate to the use of themselves, and the longest liver of them, as is well and regularly done by this deed; which was drawn by the best conveyancer in the Province.

EDM: TROWBRIDGE.

N. B. If all the messuages and lands aforesaid are sufficiently ascertained and described in the prior deed made by M. Gill and his wife, and passed by that deed to the same uses as are mentioned in this, they cannot pass again by this; but if any of them were not conveyed to those uses by that deed, they doubtless are by this; which probably was made to supply any defect there might be in the first deed.

Recent American Decisions.

Circuit Court of the United States, for the District of Massachusetts, June 5, 1854.

[Present — CURTIS, J. and SPRAGUE, J.]

UNITED STATES v. JOSEPH MINGO.

Right to Open and Close in a Capital Case — Indictment for Murder — Burden of Proof — Jurisdiction — Evidence that the Defendant was apprehended in the District where tried.

In a capital case the junior counsel has a right, in opening, to argue at length the law and the facts, but only one counsel has a right to close, except where all the witnesses examined by the defendant's counsel have been previously examined before the grand jury, and were called at the trial by the government, but not examined.

M. killed J. with a dangerous weapon, and the evidence was contradictory as to provocation, and as to which was the assailant. The court instructed the jury that it was incumbent upon the government to prove a felonious killing, and if upon the whole evidence the government had failed to satisfy the jury beyond a reasonable doubt, that the killing was felonious, the verdict of the jury must be not guilty.

It is not usual to call upon the government to offer direct evidence to prove that the defendant was first apprehended within the district where he

is tried, and if there is evidence to show that the defendant committed the offence in a ship then on the voyage direct to B., a port in the district, and is in custody in B., the jury is warranted in finding the fact.

THIS was an indictment for murder, committed by the defendant upon William Johnson, on board of the American ship John Dunlap, on the high seas.

At the trial, the killing was fully proved, and the defendant contended that it was done in excusable self-defence. From the evidence it appeared that the defendant and the deceased were both seamen, on board of an American ship, which at the time of the homicide, was on the voyage from Apalachicola to Boston; that being previously acquainted, they had shipped at Boston for the voyage out and back; that the defendant was a Haytien negro, and the deceased a colored man from Baltimore; and expressions of ill-will and anger by each party to the other, before and on the day of the killing, were put in evidence. The evidence was also uncontradicted, that about eight o'clock on the morning of the thirtieth of January, after some conversation, the two negroes came together on deck, near the fore-hatch, Johnson holding a large hatchet, and Mingo a sheath knife, in his right hand, that each used his weapon against the other, and that Johnson received three stabs in the belly from Mingo's knife, and died of one of them next morning. But as to which party made the advance and attack, on which side of the deck they met, in what direction they first moved, at what time in the affray either armed himself, at what time the stabs were given, and what words were used before they met, the testimony of nine witnesses, who were on deck and saw the affray more or less completely, was contradictory.

The defendant's counsel prayed the court to instruct the jury in conformity with the opinion of Mr. Justice Wilde, in *Commonwealth v. York*, 9 Met. 93. 1. "That when the facts and circumstances accompanying a homicide are given in evidence, the question whether the crime is murder or manslaughter, is to be decided upon the evidence, and not upon any presumption from the mere act of killing. 2. That if there be any such presumption, it is a presumption of fact, and if the evidence leads to a reasonable doubt, whether the presumption be well founded, that doubt will avail in favor of the prisoner. 3. That the burden of proof in every criminal case, is on the Commonwealth to prove all the material allegations in the indict-

ment, and if, on the whole evidence, the jury have a reasonable doubt whether the defendant is guilty of the crime charged, they are bound to acquit him." The defendant's counsel also prayed the court to instruct the jury, that as no evidence had been offered to prove that the defendant was first apprehended, or brought within this district, he was entitled to an acquittal.

Before the argument, CURTIS, J., stated to the counsel that "in a capital case the junior counsel has a right to argue at length the law and the facts, but only one counsel has a right to close. In this case, however, as all the witnesses are government witnesses, and none were called for the defence but those whom the government declined to examine, two counsel will be permitted to close, in full, on the law and facts, not, however, making this a precedent for cases in which the prisoner's counsel calls witnesses not examined before the grand jury, and sworn on the part of the government."

In summing up to the jury, CURTIS, J., said: "To bring this case within the jurisdiction of the court, the jury must be satisfied, (1), that the offence was committed on board an American vessel; (2), that the deceased and the prisoner were of the crew; (3), that the prisoner was first apprehended within this district. The first proposition is admitted by his counsel; the second, there is much and uncontradicted evidence to prove. Of the third, no direct evidence has been offered. But you have evidence to show that the ship was bound to Boston, and that the defendant is in custody in Boston. It is not usual to call upon the government to offer direct evidence on this point, and during the introduction of the evidence, the defendant's counsel made no point upon it, so as to induce the government to bring forward direct evidence. The evidence now in the case to which I have alluded, is sufficient in law to warrant the jury in finding the fact.

The fact of the killing being proved, and not denied, one of three views may be taken of it: First, That Mingo first attacked Johnson; that he made the attack with a dangerous weapon; and that though Johnson resisted with a dangerous weapon, Mingo killed him. If a man attacks another with a dangerous weapon, and kills him, no sufficient provocation appearing, the law presumes malice from the act. And if you find that Mingo attacked Johnson with a dangerous weapon, and killed him, without other

provocation than words, it is murder. On the question of the burden of proof, after consultation, the court are of opinion that it is incumbent upon the government to prove a felonious killing ; and if upon the whole evidence the government has failed to satisfy the jury beyond a reasonable doubt, that the killing was felonious, the verdict must be, not guilty." After recapitulating the evidence, his Honor continued : " It is your province, gentlemen, to determine whether such a case is proved ; but I am at liberty to say, and feel it my duty to say, that I do not think the government has proved a case of murder, beyond a reasonable doubt.

The second view is, that previous ill-will was borne by each of these men to the other ; that, being near each other on deck, words passed between them ; and that both being excited and willing to fight, they armed themselves, simultaneously, or nearly so, with dangerous weapons, both fought, and Johnson was killed. You will say whether it is made out beyond a reasonable doubt, that it was a mutual combat, in which both engaged willingly. If so, it is manslaughter. If the defendant entered into the combat willingly, he cannot say that he killed his adversary in self-defence. Where such encounters take place deliberately, as in duels, and homicide ensues, it is murder ; but where it is in hot blood, such homicide is manslaughter.

Third. If it was not a mutual combat, but Johnson made the first attack on Mingo with a deadly weapon, yet if Mingo could reasonably have avoided killing his adversary, without certain and immediate danger of his life, or of great bodily injury, the homicide is not excused as being in self-defence. But in considering whether Mingo could reasonably have avoided killing Johnson, the law does not demand of him the same coolness and the same deliberate exercise of judgment, which you, viewing the circumstances after the event, and being in safety, can and will exercise. It requires him not to avail himself of such an occasion to indulge his passion. He must have acted from a desire to protect his own life, and not from a desire to kill his adversary ; and he must have actually believed, at the moment, that the only way to protect himself from certain and immediate danger of his life, or of great bodily harm, was to stab his adversary ; and the circumstances must have been such, that you can see that Mingo might, reasonably, and did actually so believe, at the time he

struck the fatal blow. If the circumstances were such as that you can see these things, then you have a right to say, and should say, he acted in self-defence, and is not guilty of manslaughter." The jury found the defendant not guilty.

B. F. Hallett, District Attorney, for the United States.

J. H. Prince, and *F. E. Parker*, for the prisoner.

*District Court of the United States, for the District of
Massachusetts, September, 1854.*

UNITED STATES *v.* HENRY McCLARE.

Assault — Criminal Intent — Burden of Proof.

THE defendant was indicted for an assault with a dangerous weapon, on an emigrant passenger in the ship *George Peabody*, from Liverpool, of which the defendant was the second mate. It was admitted that the defendant did hit the complainant, who was a boy, on the head with a belaying-pin, which it was conceded was a dangerous weapon. The defence was that the blow was received by misadventure. It appeared that the defendant went down into the lower between-decks of the ship, at night, where it was quite dark, to suppress a noisy disturbance among the emigrant passengers, and there had a conflict with one passenger, and went through the passage-ways, striking with the belaying-pin against the berth-boards and bulkheads, and calling the passengers to order. The evidence for the defence tended to show that it was necessary for self-defence that the officer should have some weapon, there being over six hundred passengers, and that the boy was hit by accident, when leaning out of his berth, or received a chance blow during the conflict with the other passengers, and that the language and conduct of the defendant, after he found he had hit the boy, was such as to prove the blow to have been unintentional. On the other hand, the complainant and three other steerage passengers represented the language of the defendant, after the blow, to be such as indicated either an intention to hurt the complainant, or a recklessness and indifference as to whom he hit.

R. H. Dana, Jr., for the defence, argued the case to the jury, upon the evidence, and asked the court to instruct the jury, that although the indictment contained no allegation of a criminal intent or malice, in specific terms, yet that the allegation was included in the technical signification of the word "assault." Every indictment must contain an allegation of the *animus* as well as of the *corpus delicti*, and without such an allegation, it would be subject to demurrer. In criminal assaults and batteries, the *animus* is included in the terms "assault, battery." *Commonwealth v. McKie*, 17 Law Rep., May, 1854, 51; 3 Bl. Com. 121; 4 Ib. 217; 5 Dane's Abr. 584; Selwyn's N. P. "Assault," note 1; *Commonwealth v. Clark*, 2 Met. 23.

The burden of proof is on the Government to sustain the entire allegations of the indictment, the criminal intent as well as the overt act. The defendant pleads no special defence of justification or excuse. He pleads only the general issue, which puts in issue the *animus*, which is the *gist* of the indictment. There can be no confession and avoidance of a good criminal indictment. The burden of proof does not shift. *Commonwealth v. McKie*, 17 Law R. May, 1854, 51; *Commonwealth v. Dana*, 2 Met. 329; *Commonwealth v. Kimball*, 24 Pick. 366; *Commonwealth v. Bradford*, 9 Met. 268; opinion of Wilde, J., in *Commonwealth v. York*, 9 Met. 93; *Powers v. Russell*, 13 Pick. 69; Best on Presumptions, § 230; North American Review, for Jan. 1851; Article "Homicide," by Hon. Joel Parker. In the Circuit Court of the United States for this District, at the trial of Mingo, in June last, for murder,¹ the two judges coincided in the ruling, (differing from the majority of the Supreme Court of this State, in York's case,) that it was incumbent on the Government to prove a felonious killing, and if they failed to satisfy the jury, beyond a reasonable doubt, that the killing was felonious, the verdict must be not guilty.

H. L. Hallett, for the United States, conceded the general doctrine of the burden of proof in criminal cases to be as contended by the counsel for the defendant, and submitted the other points to the judgment of the court, without argument.

SPRAGUE, J., ruled that the indictment must be considered as alleging a criminal intent. The mere fact that a blow is

¹ Ante, p. 485.

struck, does not necessarily make out a crime. It may be unintentional; or, if intentional, it may be in self-defence, or in the execution of a legal duty. In charging a crime, the Government charges a criminal intent, and must prove it. Proving a blow may, in some cases, be of itself sufficient evidence of a criminal intent; but such intent may be repelled by the circumstances. If, on all the evidence, the jury are left in reasonable doubt as to the intent of the defendant, they cannot convict him of the crime, for the crime is not proved. The overt act is proved, but the character of the act, whether criminal or not, is left in doubt.

In this case it is conceded that a blow was struck with a dangerous weapon. The only question is as to the character of the act. Was it criminal or was it not? It is not pretended that the complainant was intentionally struck in self-defence, or in the execution of a duty. The only defence is that he received the blow by misadventure. If the defendant was using this weapon, which he knew was dangerous, in a reckless manner, so that he had reasonable cause to believe that he might injure some one, he is equally guilty of a criminal intent, as if he had a special intention to injure the complainant. If in a contest with another person he used it unlawfully, and hit the complainant by accident, he would be guilty. But if he hit the complainant accidentally, either while engaged in a contest in which he had a right to use the weapon, or when using it to make a noise and warn the passengers, if used so as not to be likely to endanger any one, he would not be guilty. In determining the motive, the state of mind of the defendant, you will take into view, not only his acts when below, but the language and acts attributed to him by the witnesses on each side after the occurrence, the reasonableness of his going below armed with such a weapon, and the evidence of his general peaceable and temperate character and conduct on this and other similar voyages. If, on all the evidence, you are satisfied beyond a reasonable doubt that the act was accompanied with a criminal intent, according to the definition I have given you, you will find the defendant guilty. If you are not so satisfied, he is entitled to an acquittal.

The jury found a verdict of not guilty.

*District Court of the United States for the District of
Massachusetts, October, 1854.*

NATHANIEL HEARD *et al.* v. RICHARD S. ROGERS *et al.*

Shipping Articles — Crew — Discharge — Wages — Pleading.

THIS was a case of subtraction of wages promoted by the chief mate of the ship *Columbia*, of Salem, against the owners, one of whom was also the master. The voyage was from Boston to San Francisco, and thence to Calcutta and back to the United States. The libellant left the vessel in San Francisco, and claimed wages to the time of leaving. The shipping articles contained this clause: "With an express condition, that if any of the crew desert or leave the ship at California or Calcutta, without a written discharge from the master, they shall forfeit all wages due them."

SPRAGUE, J. — There are two defences to the demand for wages, one the alleged misconduct of the libellant in endeavoring to induce several of the crew to leave the vessel at San Francisco, and the other that he himself left the ship without a written discharge from the master, and has thus forfeited his wages under the clause in the shipping articles. [His Honor reviewed the evidence under the first head, and said that he thought the charge was not proved.] On the second head, it is sufficiently proved by the libellant, that he left with the verbal permission and assent of the master, and a paper is introduced, written in pencil, and signed with the initials of the master, which might pass for a written discharge. But as there are other objections to the operation of the clause, I will not examine this paper more particularly. It is urged for the libellant, (1), that the want of a written discharge is not sufficiently pleaded; (2), that it has been waived by the admission, without objection, of parol proof of a discharge; (3), that the word "crew" was not intended (in this case) to include the chief mate; (4), that being an unusual stipulation, of a severe character, in derogation of the general rights of seamen, it should not be permitted to operate without proof that the party signing the articles had his attention called to the clause, or otherwise knew of its existence and effect.

I think these objections must prevail. The answer does not state that there was any such clause in the articles, and only alleges that the libellant left "contrary to the shipping articles." This is not sufficient notice to the libellant either of the existence of this clause, if he was, as he says, ignorant of it, or that the respondents intended to rely upon it. The court would have supposed that the shipping articles were in the usual form, and that the allegation only meant that he left before the voyage was ended. In this state of the pleadings, if the respondents allow parol evidence of a discharge to be put in, it is too late to object to the want of a written discharge. The court must consider either that a written discharge was waived, or is conceded to have been given. Such clauses, so unusual, so severe in their operation, and so little likely to be anticipated or looked for by the crew, are to be strictly construed. Although the word "crew" will often include officers, yet it is an equivocal word in common speech; and taken in the light of the circumstances of this case, and the evidence of the peculiar arrangements and understanding between the owners and the mate, I think it is not clear that it was intended to include him. There is no evidence as to when or how the libellant or any of the crew signed the articles, or that he or any of the crew knew that the clause was there, and it is in proof that this clause was put in by the special direction of one of the owners, and not in the presence of any of the crew.

On these various grounds I am of opinion that the respondents cannot avail themselves of the clause; and, if they could, as I have before said, I am inclined to hold that the pencil memorandum would be a sufficient compliance with it.

Decree for the libellants, the cause being referred to a master to examine the accounts and report upon the balance of wages due.

R. H. Dana, Jr., for the libellants; *W. C. Endicott*, for the respondents.

United States District Court, for the District of Massachusetts, October, 1854.

THE CLEMENT.

Collision — Course to be pursued by Vessels approaching each other.

A vessel off the wind must give way to one close-hauled.

Where a square-rigged vessel and a schooner, both close-hauled, are sailing upon convergent courses, on the same tack, and the convergence is caused by the ability of the schooner to lie nearest to the wind, the latter must give way.

THIS was a cause of collision, promoted by Matthew Hunt *et al.*, owners of the pilot boat *Hornet*, of Boston, against the brig *Clement*, for running down and sinking the *Hornet* in Boston harbor, in June, 1854. The libel alleged that the two vessels were coming into the harbor, by the wind, (which was W. N. W.) the *Hornet* about a half a mile to leeward of the brig, and both vessels on the starboard tack, bound for Broad Sound; that when nearly up to the North East ledge of the "Graves," the brig suddenly kept off three or four points towards Lighthouse Channel, and ran afoul of the *Hornet* and sank her.

The answer of the respondent denied this statement, and alleged that the brig was sailing towards Lighthouse Channel by the Graves, two points free, and about S. S. W., while the *Hornet* was close-hauled; that the *Hornet* persisted in trying to run across the bows of the brig, although hailed and told to keep off, and thereby caused the collision. The answer further alleged, that the brig was so near to the Graves, that she had no room to luff, or tack; but that the *Hornet* had plenty of both room and time to have avoided the other vessel by keeping off.

SPRAGUE, J. — The collision between these two vessels took place in Boston harbor, about noon, on a fine summer day, when there was a good breeze and the sea smooth. It is therefore a necessary inference, that it must have been caused by the fault of one or both of them. The sudden change in the course of the brig, I do not think is made out by the evidence, but the libel, taken in connection with the answer, presents a case of two vessels sailing on converging courses, both on the same tack, the one close-hauled, and the other two points free. Then the question is, which is to give way? There is some discrepancy of

testimony, as to where this collision took place, but from the respondent's witnesses, taken in connection with those of the libellants, I infer that it must have been outside of the buoy which is on the N. E. ledge of the Graves; the captain of the brig says he was then eastward of "the buoy;" and it is shown that there is but one buoy near the Graves, and that, half a mile from the Graves proper.

The respondent says that the *Hornet* was trying to run across the brig's bows; that is true; but it is equally true that the brig was trying to run across the schooner's bows; and it is to prevent collision in similar cases, that a rule of the sea has been established. The present case appears to be one to which the rule applies, viz., that when two vessels are approaching on convergent or conflicting courses, one close-hauled and the other free, and there is danger of collision, that vessel having the wind free must invariably give way.

If the brig had been close-hauled, and the *Hornet* close-hauled also, and the convergence of their courses had been owing to the schooner's ability to lie nearer to the wind than the other, then the brig would not have been bound to give way; for the reason that the schooner would have been in a condition in which she would have had an advantage over the square-rigged vessel, and she might have altered her course, and still been on equal terms with the other. But in this case the brig was not close-hauled; she was two points free, and it was therefore incumbent on her to have given way. It is in evidence that the captain of the brig saw the *Hornet* half an hour before the collision. He then had it in his power to have kept off at once in front of the schooner, or he might subsequently have gone under her stern, or he might have hauled his wind, and either backed his topsail, or gone about; and I am of opinion that there was room enough between her and the Graves to have done so. In fact, the brig luffed and wore round after the accident, and it is therefore justly inferrible that there was room enough for her to have done so before. As she was heading towards Lighthouse Channel, and was up to windward, she might have adopted either of the above measures, without any more detention than would be caused by a short deviation, while the schooner being as close to the wind as she could go, heading for a narrow passage near the Graves, any deviation she made would have been a detention, and a loss of

ground to leeward. It was therefore incumbent upon the brig to have adopted some one of these measures, I need not state which, and so have avoided the schooner.

Another fact tends to show negligence on the part of the brig. It appears that the captain saw the schooner half an hour before the collision, and that although he saw that the two vessels were upon converging courses, he says he paid no attention to her from that time till the collision was imminent. This was negligence on the part of the brig. Every vessel is bound to keep watch of all vessels in her vicinity, and to observe their motions and courses.

But, in addition to this, the man at the wheel of the brig testified that he heard the hail from the schooner before the collision, but took no measures to alter the course he was steering; and he gave as his reason for not doing so, that he had no order from the captain to that effect, and would not do so till he had. This cannot be justified; it was his duty in the present case, having it in his power to avoid the collision when it was imminent, to have done so immediately, without waiting for orders from the captain, when life and property were hazarded by his delay. For these reasons I think the brig was to blame.

The question then arises: Was the *Hornet* in fault also, because she did not keep away, when hailed from the brig? I do not think she was. If she were to be adjudged in fault because she persevered in holding her course, then the rule requiring a vessel with the wind free, to give way to one close-hauled, would be practically abrogated. The effect of this rule should and must be, to enable the vessel by the wind to hold her course, under the confident belief that the other will give way. It is not for the brig to complain that the *Hornet* held her course, when she herself was already off the wind, and could have kept off a little more without difficulty. I think the brig was alone to blame in this collision, and therefore a decree must be entered for the libellants, with costs, and an assessor appointed to fix damages, unless the parties can agree on the amount thereof.

Charles P. Curtis, Jr., for libellants; *F. C. Loring*, for respondents.

*Supreme Judicial Court of Massachusetts, Hampshire ss.,
September Term, 1852.*

NOAH L. STRONG vs. PHINEAS STRONG.

Arbitration — Award — Evidence.

When a submission to arbitrators is in the most general form, of all demands whatever, and there is an award of a certain sum of money as balance due from one to the other, it is a full execution of the submission.

If, under a particular submission, accompanied with a general submission, award be made concerning the particular things, and also for a money payment, the money payment will be intended to cover all other demands, unless the contrary appears.

Every reasonable intendment is to be made in favor of an award.

The rule of law, that, in order to be valid, an award must be certain and final, means, not that nothing shall remain to be done to complete the execution of the award, but that the things to be done shall be determined and defined to a reasonable certainty.

By the common law of Massachusetts, differing in this respect from the English common law, corruption or misbehavior, excess of authority, or gross errors or mistakes on the part of arbitrators, are pleadable in bar to an action on their award.

Partiality on the part of an arbitrator, unless expressly waived by the parties, in the submission or otherwise, is a good defence to an action on the award.

To act as the agent of one of the parties regarding the matters in controversy, or to receive and act on *ex parte* representations or evidence, or otherwise permit undue influence from any quarter, constitutes such partiality as will invalidate an award.

Testimony as to declarations of an arbitrator, uttered *in pais* after the making of an award, is not competent evidence to impeach its validity.

Though, in general, an arbitrator cannot be received to impeach his own award, especially by declarations *in pais*, yet he may depose to facts which transpired at or during the arbitration, and which tend to show the award to be void for legal cause.

THE material facts of this case are stated in the opinion of the court by CUSHING, J.

This action, which is debt on a bond, conditioned to perform an award, comes before us on exceptions to the ruling of the Court of Common Pleas.

The case finds that the plaintiff, Noah L. Strong, and the defendant, Phineas Strong, father of the plaintiff, occupied, for many years, adjoining farms in Southampton in this county, under a common management; that the two farms were stocked and worked, and the products taken and appropriated by the parties without any definite agreement as to the share of each; that in the year 1846, the defendant conveyed to the plaintiff an undivided half of a saw-mill and a grist-mill; that the de-

defendant took the principal management of the grist-mill, and the plaintiff that of the saw-mill; that they generally shared in the earnings of said mills, but in what proportion did not appear; that each party took notes of his mill customers payable to himself; that two small books were kept at the saw-mill, containing amounts or memoranda of sawing, in one of which were entered charges against customers, some of which remained outstanding and unsettled at the time of the arbitration.

In this relation of the parties and of their business, differences arose, to adjust which, in the year 1849, mutual bonds, with similar conditions, were entered into, which bonds, after reciting that Noah L. Strong claims of Phineas Strong payment for services rendered by Noah to Phineas, and of sundry sums of money paid, laid out and expended by Noah for the benefit of Phineas, Phineas claiming as against Noah, that the demands of the latter had been satisfied by the conveyance of real estate to him, and also alleging an equitable claim to reimbursement of a part of the value of the real estate conveyed, then proceed to stipulate that the said differences between the parties and all other demands, which either has against the other, are submitted to the award and arbitration of Asahel Burge, Heman Searl, Luther Edwards, Strong Clark, and Alvan Bates, arbitrators, indifferently chosen by and between the parties, with covenant to abide by and perform the award of said arbitrators.

The arbitrators made their award in the same year to the following effect.

First, they require the defendant to pay to the plaintiff the sum of fourteen hundred dollars in one year, with interest.

Secondly, they award that the grain of all kinds, which has been grown or taken on or from the farms of the parties, shall be equally divided between them, and that the grain now sown or growing on said farms shall be equally divided between them at the time of harvesting the same. Also, that the farming tools and implements, including carts and wagons, shall be equally divided between them. Also, that the parties each shall hold the hay which is in their respective farms. Also, that each party hold the stock of cattle, horses and other animals, which they now claim or call their own, excepting one yoke of bulls, which shall belong to the said Phineas. Also, that the logs now lying in the mill-yard shall be equally divided between the par-

ties. Also, that all debts due and owing from the said parties or either of them, contracted in the period since a certain date mentioned, to the present date, shall be paid equally between them. Also, that all debts due to the said parties standing upon their books of accounts, called the mill-book, charged during said period, shall belong to them in equal shares.

The present action is for the money payment in the award.

Of the five specifications of defence filed in the case, four consisted of assumed matters of ambiguity, uncertainty or defect, alleged to be either apparent upon the face of the award, or susceptible of being lawfully shown by parol evidence, as follows :

1. That the arbitrators had not decided all the matters in difference, submitted to them.

2. That they had decided concerning matters not within the submission.

3. That the award is not sufficiently certain in specifying the rights and liabilities of the parties and the property which is to be affected thereby.

4. That the award is not in effect final.

At the trial it was ruled, that the award is not invalid or void on account of any of these matters, and we are all of the same opinion.

We think the award, on the face of it, has the requisite conditions of competency of matter, certainty and finality, according to the principles of law as settled in other adjudicated cases.

In the first place, there is a specific award in relation to the main object of controversy, namely, the demands of the plaintiff for services and for money expended, and, by operation of law, of the demand of the defendant for reimbursement of a balance alleged on the conveyance of land.

As to this portion of the award, it was argued under the first specification of defence that the award does not cover the demand for reimbursement, because that reimbursement though expressly mentioned in the submission is not expressly mentioned in the award ; but we think, that, in a submission of all demands, where money is claimed on either or both sides, an award between the parties of a balance to be paid by either, is a conclusion of the matter in controversy,

without a detailed account or other statement of those matters; *Leavitt v. Comer*, 5 Cush. 129; *Shirley v. Shattuck*, 4 Cush. 470; *Houston v. Pollard*, 9 Met. 164; or to apply the language of the court in the case of *Bigelow v. Maynard*, 4 Cush. 317, the arbitrators, in finding the balance due to a party, do also necessarily find what deduction, if any, should be made for his claim, as certainly as if they had in express terms stated the sum which they deducted.

In this case, the arbitrators, in deciding that a balance was due to the plaintiff, in effect disposed of *all* money-claims of the defendant, and of course of the particular claim for reimbursement of money on account of the conveyance of land.

Where a submission is in the most general form, of all demands and controversies whatever, and there is an award of a certain sum of money as a balance due from the defendant to the plaintiff, it may well be taken as a full execution of the submission.

And, by parity of reasoning, if under a particular submission, accompanied with a general submission, certain specific things be awarded, and also payment of a certain sum of money, the money payment will be intended to cover all other demands unless the contrary appear. For the present is not the case of an action pending and all matters in difference referred, and an award to pay a sum of money without disposing of the action, which was properly held to be bad. See *Billing's Law of Awards*, pp. 128 - 132. Here the award is perfectly susceptible of being so construed as to dispose completely of all the matters of difference whatsoever; especially if we bear in mind the rule that, according to the modern doctrine, every reasonable intendment is to be made in favor of an award, and it is sufficient to have it appear in the award with reasonable certainty what the rights of the parties are, so as to prevent future controversy and litigation for the ascertainment of those rights.

It was also argued, under the same specification, that, it being shown by parol that the subject of the notes heretofore spoken of was submitted for consideration by the parties at the hearing before the arbitrators, and the notes not being specially mentioned in the award, it is defective in that respect. But as the notes, held by either party, were on the face of them payable to such party, and his

property, unless by proof or award the contrary were shown, to abstain from all mention of them in the award, may well be construed as having the legal effect of leaving them as they previously stood, namely, the property of him in whose possession they might be.

Besides, the general consideration, already stated, that courts will make no intendment for the purpose of overturning an award, applies here. It will be intended that arbitrators have decided all matters submitted to them, unless the contrary appears; and it is incumbent on the party who seeks to impeach an award, on the ground that it does not decide all the matters submitted, to show this, *Tallman v. Tallman*, 5 Cush. 325. Here, also, as in the case cited, all intendment to the contrary is precluded by the finding in the case, that the present arbitrators did in fact consider and intend to decide, and did decide so much of the depending difference between the parties as related to the notes; and the actual objection taken, as recognized in the agreement of counsel, is, not that the question of the notes was not decided by the arbitrators in fact, but that, in their award, they have not specially awarded thereon. We think the true and only question here is, whether the subject of the notes having been submitted to the arbitrators, it was actually decided by them, and whether the terms of the award will admit of such construction as to comprehend that decision. We think the award, considered as a whole, and in its due relation to the submission, is comprehensive enough to cover and conclude this particular subject-matter.

In the second place, in regard to other matters of common interest, the award proceeds to make partition of certain debts, credits and effects between them in equal shares, as upon a dissolution of copartnership.

The second, third, and fourth specifications of defence apply to this part of the award.

Under the second specification, it is argued that the award goes beyond the submission, in providing for the payment of all debts due or owing from the said parties or either of them during a certain period; whereas it is found, among other things in the case proved by parol, that the arbitrators were called to pass upon no matters except those in which the parties were jointly interested. But *non constat* that all the debts, owing from either party, were not shown before the arbitrators, by admission or

other satisfactory evidence, to be matters of joint interest. Such proof would have been quite in consonance with what otherwise appears of the business relations of the parties.

In the case of *Shearer v. Handy*, 22 Pick. 417, which in some points resembles the present one, there was an agreement between mother and son, "to refer all their unsettled accounts" to three arbitrators, who awarded that the son should pay all the debts, and receive from the mother \$250, and half of their farm stock; the award was held to be not binding, because it manifestly exceeded the terms of the submission. Here the submission was of all depending differences, and the award is relieved from any objection of want of power in the arbitrators.

Under the third and fourth specifications, it is argued that the award is bad, for uncertainty in this point, and for defective determination of the rights and property awarded; and that the award is not final, as it leaves undivided, in fact, things which it purports to divide. But, in regard to all these points, we think the award is maintainable, as definitely prescribing a rule, by which the partnership property is to be divided; namely, that as to the cattle, excepting one pair specially transferred, they shall continue and remain the separate property of each, according to their previously understood ownership and possession; and that certain other chattels, together with debts and book credits, shall be divided and assigned equally between the parties.

It is true, the arbitrators do not themselves actually sever the things to be divided, whether hay, grain, utensils or logs. There is nothing in the submission which requires them to effect such actual severance and manual distribution of these things. They adjudge and award that the things shall be divided, and they decide in what proportions. In many cases, no more is possible to be done; as of an award for the division of partnership effects, which may happen at the time to be abroad, or otherwise not in the personal possession of either party, and of which the quantity or value is not known; or, as in the case of an award concerning objects, not in their nature presently divisible, but hereafter susceptible of division, such as the yet immature crop of a fruit-tree; or, as in the case of joint interests not in their nature capable at any time of material severance, like the property in a

ship. All these, and many other examples which, readily suggest themselves, would seem to show that an award, which purports to divide property between two persons, by prescribing a rule of division, may well be final, though the property in question be not actually divided, nay, though it be incapable of actual division. If the award give a definite and certain rule for the division, there is no want of power in the laws to apply the rule and enforce its application.

Though possible doubt may attach to the doctrine, by reason of *dicta* in some late English cases, (see the cases collected in Billing on Awards, pp. 135, 136, note e), yet, on the whole, it is admitted in those very cases, that, if the arbitrator makes "some regulations upon the matters of difference," to use the words of Baron Parke, or "gives direction" as to what is to be done, according to the language of Lord Abinger, it is decisive in favor of the award. An award is final when it is an absolute conclusive adjudication of the matters in dispute. *Karthauss v. Ferrer*, 1 Peters, 230.

When it is laid down as a principle of law, that an award should be final, the meaning is, not that nothing shall remain to be done to complete the execution of the award, but that the thing to be done shall have been determined and defined to a reasonable certainty. Thus an award is bad, which requires A. to give bonds to B., with such sureties as B. shall approve; because that commits every thing to the discretion of B. Com. Dig. Arb. 315. But an award, that the property of a pump is in A., and that B. has a right to use it, and that it shall be repaired at their joint expense, has been adjudged to be final. *Boodle v. Davis*, 3 Ad. & El. 200. Yet, in this last named case, many things remained to be done to give effectual execution to the award, about which things it was quite possible for litigation to arise. But the respective rights of the parties being determined by the award, it is to be taken as valid; for the law furnishes the appropriate remedies for the enforcement of those rights.

Indeed, in all this second part of the award before us, to which the second, third and fourth specifications of defence apply, it may be easy to imagine how a greater degree of precision might have been attained by the arbitrators in expressing their will; and, if it were the case of an award subject to recommitment, we might look at it

with a more critical eye; but we are not prepared to say that, in these particulars, the award is not final, or is so indefinite and uncertain, as to be incapable of execution, and, therefore, absolutely void.' And the general view which we take of this case, relieves us from the necessity of inquiring into the questions of admissibility of evidence raised on this part of the record.

But we cannot so readily dispose of the fifth specification, which alleges that Luther Edwards, one of the arbitrators, was not a disinterested person, and had, in making the award, conducted himself with partiality to the plaintiff.

This specification involves the question, of how far the validity of an award is affected by sentiments or acts of partiality on the part of an arbitrator; and also the question upon the facts and arguments in the present case, in what manner, if such partiality be alleged, it shall be proved.

It seems to be thoroughly settled in this Commonwealth as well as in England, in accordance with the doctrine of the civil law, and of natural justice, that corruption or fraud, *siquid dolo in ea re factum sit*, if lawfully shown, will set aside an award; and in this Commonwealth it is a good defence to a suit on the award.

Thus, in the case of *Brown v. Bellows*, 4 Pick. 179, this court has declared that an award may be set aside for fraud, clear mistake, or corruption; or, as it is otherwise stated in the same case, if there be proof of fraud, corruption, or misbehavior of the arbitrators.

In the case of *Bean v. Farnham*, 6 Pick. 269, the invalidity of an award by reason of misbehavior of the arbitrators is recognized, and the court indicates the nature of the remedy under the common law of this Commonwealth, Dane's Abr., ch. xiii., art. 4; according to which, differing in this respect from the English common law, corruption of the arbitrators, excess of authority, or gross errors and mistakes in the award, are pleadable in defence to an action on the award; which innovation in pleading grew out of our courts not possessing the full powers of Courts of Chancery in England.

In the case of *The Boston Water Power Co. v. Gray*, 6 Met. 131, the court define the conditions of law or fact in which the court will set aside an award upon matters not arising out of the submission or award, to be when there "is some corruption, partiality or misconduct on the

part of the arbitrators, or some fraud or imposition on the part of the party attempting to set up the award, by means of which, the arbitrators were deceived or misled;" and an award may undoubtedly be impeached and avoided by proof of fraud, provided it be fraud practised upon or by the referees.

In the later case of *Withington v. Warren*, 10 Met. 431, where an award was sustained, although proof was offered that one of the arbitrators had, upon the statement of the chairman, that it was right, signed the award without reading it or knowing its contents; yet it was admitted that, if it could have been shown that the arbitrator was induced by some false representation, fraud, or misconduct, to sign a different award from that which he intended, this would have been fatal. Without multiplying authors on this point, it suffices to refer to the carefully expressed instructions of the judge, (C. J. Shaw,) to the jury in the case of *The Boston Water Power Co. v. Gray*, and the decision of the whole court thereon, to establish the position that corruption, fraud or misconduct is decisive against an award.

If, therefore, in the present case, fraud and corruption were distinctly alleged, or plainly appeared on the face of the proofs, there would be no room for question or doubt as to the matters to be decided by this court.

But nearly all the authorities cited speak also of misconduct or misbehavior of the arbitrator, as invalidating an award. And, if so, can there be any grave cause of doubt, when the thing alleged is undue influence of a party attempted, or exercised, upon one or more of the arbitrators, especially if the arbitrator or arbitrators yield to that influence? Is not that rightly to be deemed misconduct or misbehavior on the part of an arbitrator? We cannot but think so. We have no hesitation in expressing our opinion of the impropriety and unfitness, — to say the least, — of any *ex parte* representations being received by an arbitrator, during an arbitration, from either of the parties to the controversy.

To judge of the true bearings of the fact, it is only necessary to reflect on the relation and character of arbitrators. Like jurors, impanelled for the trial of a cause, or judges on the bench, they are invested *pro hac vice*, with judicial functions; the rightful discharge of which calls for, and presupposes, the most absolute impartiality. And a judge,

a juror, an arbitrator, a commissioner of partition, should not only possess the quality of impartiality in fact, and have the conscience of it in the given case; he should, moreover, sedulously shun all the possibilities even of insensible bias. Nor is it enough, for any person thus appointed to decide the conflicting rights of others, to be animated with the purpose of conscientious decision and to decide, in fact, according to the law and the truth of the case. A judge ought to place and keep himself beyond the suspicion of dishonorable influences. Though his judgment of the pending controversy be altogether a just one, yet he is false to his duty if he expose his mind to the chance or danger of perversion. It was held, and rightfully so, to be no defence or justification of the conduct of a judge, who was, in many respects, the greatest and wisest man of his day, Sir Francis Bacon, that his decision was adverse to the party from whom he received a gift, bestowed for the purpose of conciliating his favor. 2 Camp. Lives of the Lord Ch., 2d Am. ed. 336.¹ For the moral influence of judicial decisions is to be guarded, as well as the rightfulness of the judgment in the given case. And, although an arbitrator has only special, and often very limited and narrow duties, and is not assumed to possess all the general conditions of a judge, and is not under oath like a juror, yet the analogy of his duties remains the same as if he were appointed by the highest public authority, or sworn to impartiality of judgment. *Compromissum ad similitudinem judiciorum redigitur*, says the Digest. In accordance with which, it is that the law gives to an arbitrator some of the immunities of a judge. Thus, it protects him, in general, from question as to the grounds of his judgment, 1 Greenl. Ev. § 249; and from personal responsibility for errors which he may honestly commit. Billing, Law of Awards, pp. 103, 104.

In a word, the duties of an arbitrator being *quasi* judicial, his judgment and his deportment in the powers of judgment, are to be considered and tested by the *criteria* of impartiality, which apply to the general subject-matter, and which the first principles of rational justice dictate and prescribe.

There is nothing singular in the conclusion here suggested of influences, in themselves undue, but altogether short of corruption, being so applied to the mind of an-

¹ Query, p. 832. Ed.

other, as to impair the validity of an act otherwise lawful. The question, which sometimes arises upon contested wills, is an obvious and pertinent illustration of the general idea. 1 Jarman on Wills, by Perkins, c. 3.

This obvious legal conclusion of this doctrine has not been affirmed as yet by any decision of this court; nor has the contrary been adjudged. Hence it may be assumed as an open question. But it seems to be well settled in England, whether at common law or in equity.

The statute of 9 and 10 Wm. 3, ch. 15, which authorizes submission to arbitration, to be made by rule of court, provides for setting an award aside, when it shall appear that the arbitrators "misbehaved themselves," and that the award "was procured by corruption or undue means," or as it is otherwise described in the act, "by corruption or undue practice." Bac. Abr. Arb. B.

The provisions of this act are special ones; and the power to set aside an award under it can be exercised only in the case of a rule of court, and it would seem only by the court granting the rule. 2 Story, Eq. Jur. § 1450, note; § 1452, note.

And at common law, fraud, partiality, misconduct, is not pleadable to an action on an award. Kyd on Awards, ch. 7, p. 227. But these peculiarities of jurisdiction do not affect the question of principle, as to what is misbehavior on the part of arbitrators.

Lord Hardwicke set aside an award in an early case, as being unfairly obtained. *Ives v. Medcalf*, 1 Atk. 64; see also *Burton v. Knight*, 2 Vern. 514.

Lord Thurlow, in a subsequent case, said that an arbitrator should be indifferent; for, by considering himself as the agent of the person appointing him, he acts against good faith and breaks a most solemn engagement. *Calcraft v. Roebuck*, 1 Ves. Jr. 227.

The leading modern case is that of *Walker v. Frobisher*, decided by Lord Eldon, 6 Ves. 70, to the effect that if an arbitrator receive any evidence *ex parte* and irregularly, it is against general principles, and is fatal to the award.

In so deciding, Lord Eldon did but follow an already strong *set* of legal opinions. The greater prevalence of arbitration in modern times, while it has led the courts to adopt more liberality of construction regarding defects of mere form or honest errors, (see *Peters v. Peirce*, 8 Mass.

398,) has, at the same time, been followed by more strictness of judgment as to the character and conduct of arbitrators in the relation of impartiality and integrity, both in the equity and the common law tribunals.

The doctrine in the case of *Walker v. Frobisher* was afterwards affirmed by Lord Eldon himself in *Featherstone, v. Cooper*, 9 Ves. 67, in which case he says, that arbitrators must understand "that they are acting corruptly, acting as agents; and that their award ought to be set aside, where they take instructions or talk with one party in the absence of the other." The same doctrine has been recognized as a sound principle by the Courts of Common Law in England. Thus, if an arbitrator examine one of the parties or his witnesses, without notice to the opposite party, the award will be set aside. *In re Hick*, 8 Taunt. 694. So where an arbitrator questions a witness, and receives statements from him in the absence and without the consent of one party to the reference. *Dobson v. Sutter*, 6 Adol. & El. N. S. 637. So, when the arbitrators, by agreement together, examined a witness each separately from the other, and in the absence of the parties, the court held the course pursued to be contrary to natural justice, and to vitiate the award. *In re Plews*, 6 Adol. & El. N. S. 845. In these cases the rule of impartiality, of exact justice and of punctilious adherence to all its requisitions, is laid down as the law to guide the conduct of arbitrators.

And though, therefore, arbitrators be nominated, one by each party, still they are not to consider themselves as representing separate parties, and the advocates of opposite sides; but as called on to execute a joint trust, and to look impartially, at the true merits of the matter submitted to their judgment. Caldwell on Arbitration, p. 51.

In this Commonwealth, with a jurisprudence emphatically eclectic in its character, drawing both rights and remedies almost indifferently from either common law or equity, as the interests of justice may require, it has been held theoretically that arbitrators ought to be indifferent and impartial, both in sentiment and in action. *Fox v. Hazleton*, 10 Pick. 275.

If, indeed, parties in controversy choose to waive the right of impartial trial, and purposely and avowedly select as arbitrators persons having formed opinions on the subject-matter, or known to have partialities for and against the respective parties, the court, without commending,

will not set aside the award, merely because of the character of the arbitrators. But if parties really intend to have their rights decided by impartial judges, they are entitled to insist that each and all of them be impartial. Therefore, proof of bias and strong partiality on the part of an arbitrator, would form a serious objection to the acceptance of an award. It would be no valid answer to the objection, that such referee did not discover undue partiality in the deliberations of the referees, and made no unusual exertion to influence their minds, because it is impossible to determine to what extent their judgment might have reposed on his reasonings and suggestions, or how far their decisions were influenced by him.

Such is the deliberate opinion of this court as expressed in the case of *Fox v. Hazleton*, 10 Pick. 275. It remains only, as the natural complement of this opinion, to decide that arbitrators appointed indifferently as impartial men, shall, in the true spirit of impartiality, hold themselves beyond the improper interference of either party, or undue influence from any quarter.

We are the more disposed to state unequivocally the conclusions to which we have arrived on the whole matter, for the reason that, as the case itself suggests the irregular interference by a party, and the consequent exercise of influence by him over the mind of an arbitrator, with or without actual prejudice to the rights or interests of the other party,—under these circumstances, not to condemn in principle such interference, and such exercise of influence, would be impliedly to sanction it, and to leave it to the indirect sanction of this court. If any such interposition has been practised in arbitrations heretofore, under impression, on the part either of arbitrators or of litigants, that such interposition is not wrong, it is time this impression should be corrected, and sounder notions of right be communicated to the public mind. It is not to be permitted that so much as the shadow of a spot shall tarnish the unsullied purity of the justice of this Commonwealth.

We conclude, therefore, that not corruption or fraud only in an arbitration, but also the exercise of undue or improper influence, applied by one of the parties to one or more of the arbitrators, by separate conference, or other ways of approach, is a lawful defence to an action on the award; and applying this conclusion of law and the doc-

trine it embraces, to the case before us, we feel constrained to order a new trial upon the single issue of the matters embraced in the fifth specification of defence, which, in our judgment, is a fit question for the consideration of the jury.

But, as the record shows that a verdict was taken in the court below on one point, namely, the alleged assent of the defendant to the award, and as our opinion disposes of all the other questions in the case, a new trial is granted upon the condition only, that the defendant will take no exception to the award, save on the single question presented by the fifth specification; and, as well to prevent mistakes on this point as for other sufficient reasons, the new trial will be had in this court.

Objection was taken below, on the assumption that the refusal of the plaintiff to allow the defendant after the making of the award, and before action brought, to inspect or take the mill-books, is pleadable in law to this action; but we think it was rightly ruled by the Court of Common Pleas, that the defendant's remedy for such alleged refusal is upon his bond.

We do not propose, in the present position of the case, to go into or even touch the evidence adduced, bearing on the question of the imputed partiality of Edwards. That is the very inquiry upon which the jury is to pass, and as to which we have not formed, and of course do not express, any opinion.

The case finds, however, that Edwards himself, the arbitrator, whose partiality is impeached, and two other witnesses, Phineas Strong, Jr., and Lyman Strong, were called to give evidence on that part of the subject; and we think it necessary to say we do not readily perceive how the evidence of Phineas Strong, Jr., and Lyman Strong, came to be competent. They testify to *post litem* declarations of Edwards, one of the arbitrators. Is not this, in any view of it, as between the plaintiff and defendant, hearsay evidence? If the question were of an action of any sort against Edwards himself, provided any such be possible, as for instance in the analogous case of the impeachment of a judge, we conceive that his declarations, admitting improper influences in the decision of a case, would be evidence, whenever and wherever uttered by him. There may possibly be proceedings in equity, in which this evidence would be admitted in such a relation as the present. But we cannot think it competent

in this case, according to any rule of proceeding or evidence at common law.

Indeed, on a first view of the subject, we entertained some doubts of the admissibility of the testimony of Edwards himself. But the admission of such evidence seems to be required by the necessities of justice. It is received without challenge, (see *in re Hick*, 8 Taunt. 694), in the English courts. And though the general doctrine be that an arbitrator cannot be suffered to impeach his own award, *Bigelow v. Maynard*, 4 Cush. 317, especially by declarations *in pais*, yet, in cases like the present, this court, in sittings at *Nisi Prius*, has admitted the arbitrators to depose to facts, which transpired at or during the arbitration, tending to show the award to be void for legal cause, (see *Boston Water Power Co. v. Gray*, 6 Met. 131, *cor. Shaw*, Ch. J.; *Winsor v. Griggs*, 5 Cush. 210, *cor. Bigelow*, J.); and we think it was correctly done. 2 Greenl. Ev. § 78.

Recent English Decision.

Court of Exchequer, Hilary Term, 17 Vic. Feb. 23, 1854.

HADLEY AND ANOTHER v. BAKENDALE AND OTHERS.¹

Damages, Rule of, for Breach of Contract.

Where two parties have made a contract, which one of them has broken, the damages which the other party ought to receive, in respect of such breach of contract, should be such as may be fairly and reasonably considered as either arising naturally, *i. e.* according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it.

Where the plaintiffs, the owners of a flour-mill, sent a broken iron shaft to an office of the defendants, who were common carriers, to be conveyed by them, and the defendants' clerk, who attended at the office, was told that the mill was stopped, that the shaft must be delivered immediately, and that a special entry, if necessary, should be made to hasten its delivery; and the delivery of the broken shaft to the consignee, to whom it had been sent by the plaintiffs as a pattern by which to make a new shaft, was delayed for an unreasonable time, in consequence of which the plaintiffs did not receive the new shaft for some days after the time they ought to have received it, and were consequently unable to work their mill for want of the new shaft, and thereby incurred a loss of profits: *Held*, that under the circumstances, such loss could not be recovered in an action against the defendants as common carriers.

THE first count of the declaration stated, that, before

¹ 9 Exch. Rep. 24.

and at the time of the making by the defendants of the promises hereinafter mentioned, the plaintiffs carried on the business of millers and mealmen in copartnership, and were proprietors and occupiers of the City Steam Mills, in the city of Gloucester, and were possessed of a steam engine, by means of which they worked the said mills, and therein cleaned corn, and ground the same into meal, and dressed the same into flour, sharps and bran ; and a certain portion of the said steam engine, to wit, the crank shaft of the said steam engine, was broken and out of repair, whereby the said steam engine was prevented from working, and the plaintiffs were desirous of having a new crank shaft made for the said mill, and had ordered the same of certain persons trading under the name of W. Joyce & Co. at Greenwich, in the county of Kent, who had contracted to make the said new shaft for the plaintiffs : but before they could complete the said new shaft, it was necessary that the said broken shaft should be forwarded to their works at Greenwich, in order that the said new shaft might be made so as to fit the other parts of the said engine, which were not injured, and so that it might be substituted for the said broken shaft ; and the plaintiffs were desirous of sending the said broken shaft to the said W. Joyce & Co. for the purpose aforesaid ; and the defendants, before and at the time of the making of the said promises, were common carriers of goods and chattels for hire from Gloucester to Greenwich, and carried on such business of common carriers, under the name of Pickford & Co. ; and the plaintiffs, at the request of the defendants, delivered to them as such carriers the said broken shaft, to be conveyed by the defendants, as such carriers, from Gloucester to the said W. Joyce & Co. at Greenwich, and there to be delivered for the plaintiffs on the second day after the day of such delivery, for reward, to the defendants ; and in consideration thereof, the defendants then promised the plaintiffs to convey the said broken shaft from Gloucester to Greenwich, and there on the second day to deliver the same to the said W. Joyce & Co., for the plaintiffs. And although such second day elapsed before the commencement of this suit, yet the defendants did not nor would deliver the said broken shaft at Greenwich on the said second day, or to the said W. Joyce & Co. on the said second day, but wholly neglected and refused so to do for the space of seven days after the said shaft was so delivered to them as aforesaid.

The second count stated, that the defendants being such

carriers as aforesaid, the plaintiffs, at the request of the defendants, caused to be delivered to them, as such carriers, the said broken shaft, to be conveyed by the defendants, from Gloucester aforesaid, to the said W. Joyce & Co. at Greenwich, and there to be delivered by the defendants for the plaintiffs within a reasonable time in that behalf for reward to the defendants ; and in consideration of the promises in this count mentioned, the defendants promised the plaintiffs to use due and proper care and diligence in and about the carrying and conveying the said broken shaft from Gloucester aforesaid to the said W. Joyce & Co. at Greenwich, and there delivering the same for the plaintiffs in a reasonable time then following for the carriage conveyance and delivery of the said broken shaft as aforesaid ; and although such reasonable time elapsed long before the commencement of this suit, yet the defendants did not nor would use due or proper care or diligence in or about the carrying or conveying or delivering the said broken shaft as aforesaid, within such reasonable time as aforesaid, but wholly neglected and refused so to do ; and by reason of the carelessness, negligence and improper conduct of the defendants, the said broken shaft was not delivered for the plaintiffs to the said W. Joyce & Co. or at Greenwich, until the expiration of a long and unreasonable time after the defendants received the same as aforesaid, and after the time when the same should have been delivered for the plaintiffs ; and by reason of the several premises the completing of the said new shaft was delayed for five days, and the plaintiffs were prevented from working their said steam-mills and from cleaning corn and grinding the same into meal, and dressing the meal into flour, sharps or bran, and from carrying on their said business as millers and mealmen for the space of five days beyond the time that they would otherwise have been prevented from so doing, and they thereby were unable to supply many of their customers with flour, sharps, and bran during that period, and were obliged to buy flour to supply some of their other customers, and lost the means and opportunity of selling flour, sharps and bran, and were deprived of gains and profits which otherwise would have accrued to them, and were unable to employ their workmen, to whom they were compelled to pay wages during that period, and were otherwise injured ; and the plaintiffs claimed £300 damages.

The defendants pleaded *non assumpsit* to the first

count, and to the second, payment of £25 into court in satisfaction of the plaintiffs' claim under that count. The plaintiffs entered a *nolle prosequi* as to the first count; and as to the second plea, they replied that the sum paid into court was not 'enough to satisfy the plaintiffs' claim in respect thereof; upon which replication issue was joined.

At the trial, before CROMPTON, J., at the last Gloucester assizes, it appeared that the plaintiffs carried on an extensive business as millers at Gloucester; and that on the 11th of May their mill was stopped by a breakage of the crank shaft by which the mill was worked.

The steam engine was manufactured by Messrs. Joyce & Co., the engineers at Greenwich, and it became necessary to send the shaft as a pattern for a new one to Greenwich. The fracture was discovered on the 12th, and on the 13th the plaintiffs sent one of their servants to the office of the defendants, who are the well-known carriers trading under the name of Pickford & Co., for the purpose of having the shaft carried to Greenwich.

The plaintiffs' servant told the clerk that the mill was stopped, and that the shaft must be sent immediately; and in answer to the inquiry when the shaft would be taken, the answer was, that if it was sent up by 12 o'clock, any day, it would be delivered at Greenwich on the following day. On the following day the shaft was taken by the defendants, before noon, for the purpose of being conveyed to Greenwich, and the sum of £2 4s. was paid for its carriage for the whole distance; at the same time the defendants' clerk was told that a special entry, if required, should be made to hasten its delivery.

The delivery of the shaft at Greenwich was delayed by some neglect; and the consequence was, that the plaintiffs did not receive the new shaft for several days after they would otherwise have done, and the working of their mill was thereby delayed, and they thereby lost the profits they would otherwise have received.

On the part of the defendants it was objected, that these damages were too remote, and that the defendants were not liable with respect to them. The learned Judge left the case generally to the jury, who found a verdict, with £25 damages beyond the amount paid into court.

Whateley, in last Michaelmas term, obtained a rule nisi for a new trial, on the ground of misdirection.

Keating and Dowdeswell (Feb. 1) showed cause — The

plaintiffs are entitled to the amount awarded by the jury as damages. These damages are not too remote, for they are not only the natural and necessary consequence of the defendants' default, but they are the only loss which the plaintiffs have actually sustained. The principle upon which damages are assessed is founded upon that of rendering compensation to the injured party. This important subject is ably treated in Sedgwick on the Measure of Damages. And this particular branch of it is discussed in the third chapter, where, after pointing out the distinction between the Civil and the French Law, he says: ¹ "It is sometimes said in regard to contracts, that the defendant shall be held liable for those damages only which both parties may fairly be supposed to have at the time contemplated, as likely to result from the nature of the agreement, and this appears to be the rule adopted by the writers upon the Civil Law." In a subsequent passage he says, "In cases of fraud the Civil Law made a broad distinction;" ² and he adds, "that in such cases the debtor was liable for all the consequences."

It is difficult, however, to see what the ground of this principle is, and how the ingredient of fraud can affect the question. For instance, if the defendants had maliciously and fraudulently kept the shaft, it is not easy to see why they should have been liable for these damages, if they are not to be held so where the delay is occasioned by their negligence only. In speaking of the rule respecting the breach of a contract to transport goods to a particular place, and in actions brought on agreements for the sale and delivery of chattels, the learned author lays it down, that "In the former case, the difference in value between the price at the point where the goods are and the place where they were to be delivered, is taken as the measure of damages, which in fact amounts to an allowance of profits; and in the latter case, a similar result is had by the application of the rule, which gives the vendee the benefit of the rise of the market price."³

The several cases, English as well as American, are there collected and reviewed. [PARKE, B.—The sensible rule appears to be that which has been laid down in France, and which is declared in their code — Code Civil, liv. iii. tit. iii. §§ 1149, 1150, 1151, and which is thus translated in Sedgwick: ⁴ "The damages due to the creditor consist

¹ Page 64.² Page 66.³ Page 80.⁴ Page 67.

in general of the loss that he has sustained, and the profit which he has been prevented from acquiring, subject to the modifications hereinafter contained. The debtor is only liable for the damages foreseen, or which might have been foreseen at the time of the execution of the contract, when it is not owing to his fraud that the agreement has been violated. Even in the case of non-performance of the contract, resulting from the fraud of the debtor, the damages only comprise so much of the loss sustained by the creditor and so much of the profit which he has been prevented from acquiring, as directly and immediately results from the non-performance of the contract.”] If that rule is to be adopted, there was ample evidence in the present case of the defendants’ knowledge of such a state of things as would necessarily result in the damage the plaintiffs suffered through the defendants’ default. The authorities are in the plaintiffs’ favor upon the general ground. In *Nurse v. Barns*, 1 Sir T. Raym. 77, which was an action for the breach of an agreement for the letting of certain iron mills, the plaintiff was held entitled to a sum of £500, awarded by reason of loss of stock laid in, although he had only paid £10 by way of consideration.

In *Borradaile v. Brunton*, 8 Taunt. 535; 2 Moore, 582, which was an action for the breach of the warranty of a chain cable, that it should last two years, as a substitute for a rope cable of sixteen inches, the plaintiff was held entitled to recover for the loss of the anchor, which was occasioned by the breaking of the cable within the specified time. [ALDERSON, B. — Why should not the defendant have been liable for the loss of the ship? PARKE, B. — Sedgwick doubts the correctness of that report.¹ MARTIN, B. — Take the case of the non-delivery by a carrier of a delicate piece of machinery, whereby the whole of an extensive mill is thrown out of work for a considerable time; if the carrier is to be liable for the loss in that case, he might incur damages to the extent of £10,000. PARKE, B. referred to *Everard v. Hopkins*, 2 Bulst. 332.]

These extreme cases, and the difficulty which consequently exists in the estimation of the true amount of damages, supports the view for which the plaintiffs contend, that the question is properly for the decision of a jury, and

¹ The learned judge has frequently observed of late, that the 8th Taunton is of but doubtful authority, as the cases were not reported by Mr. Taunton himself.

therefore that this matter could not properly have been withdrawn from their consideration. In *Ingram v. Lawson*, 6 Bing. N. C. 212, the true principle was acted upon. That was an action for a libel upon the plaintiff, who was the owner and master of a ship, which he advertised to take passengers to the East Indies; and the libel imputed that the vessel was not seaworthy, and that Jews had purchased her to take out convicts. The court held, that evidence showing that the plaintiff's profits after the publication of the libel, were £1500 below the usual average, was admissible, to enable the jury to form an opinion as to the nature of the plaintiff's business, and of his general rate of profit. Here also the plaintiffs have not sustained any loss beyond that which was submitted to the jury. *Bodley v. Reynolds*, 8 Q. B. 779, and *Kettle v. Hunt*, Bul. N. P. 78 a, are similar in principle. In the latter it was held, that the loss of the benefit of trade, which a man suffers by the detention of his tools, is recoverable as special damage. [PARKE, B. — Suppose, in the present case, that the shaft had been lost, what would have been the damage to which the plaintiffs would have been entitled?] The loss they had sustained during the time they were so deprived of their shaft, or until they could have obtained a new one. In *Black v. Barendale*, 1 Exch. 410, by reason of the defendant's omission to deliver the goods within a reasonable time at Bedford, the plaintiff's agent, who had been sent there to meet the goods, was put to certain additional expenses, and this court held that such expenses might be given by the jury as damages.

In *Brandt v. Bowlby*, 2 Barn. & Adol. 932, which was an action of assumpsit against the defendants, as owners of a certain vessel, for not delivering a cargo of wheat shipped to the plaintiffs, the cargo reached the port of discharge, but was not delivered. The price of the cargo, at the time it reached the port of destination, was held to be the true rule of damages. "As between the parties in this cause," said PARKE, J., "the plaintiffs are entitled to be put in the same situation as they would have been in if the cargo had been delivered to their order at the time when it was delivered to the wrong party; and the sum it would have fetched at that time is the amount of the loss sustained by the non-performance of the defendant's contract." The recent decision of this court in *Waters v. Towers*, 8 Exch. 401, seems to be strongly in the plaintiffs' favor. The defendants there had agreed to fit up the plaintiffs' mill

within a reasonable time, but had not completed their contract within such time; and it was held that the plaintiffs were entitled to recover, by way of damages, the loss of profit upon a contract they had entered into with third parties, and which they were unable to fulfil by reason of the defendants' breach of contract. [PARKE, B. — The defendants there must, of necessity, have known that the consequence of their not completing their contract would be to stop the working of the mill. But how could the defendants here know that any such result would follow?] 'There was ample evidence that the defendants knew the purpose for which this shaft was sent, and that the result of its non-delivery in due time would be the stoppage of the mill; for the defendants' agent, at their place of business, was told that the mill was then stopped, that the shaft must be delivered immediately, and that if a special entry was necessary to hasten its delivery, such an entry should be made.

The defendants must, therefore, be held to have contemplated, at the time, what in fact did follow, as the necessary and natural result of their wrongful act.

The plaintiffs' counsel also cited *Ward v. Smith*, 11 Price, 19; and PARKE, B., referred to *Levy v. Langridge*, 4 M. & W. 337.

Whateley, Willes, and Phipson, in support of the rule, (Feb. 2.)

It has been contended, on the part of the plaintiffs, that the damages found by the jury are a matter fit for their consideration; but still the question remains, In what way ought the jury to have been directed? It has been also urged, that in awarding damages, the law gives compensation to the injured individual. But it is clear that complete compensation is not to be awarded; for instance, the non-payment of a bill of exchange might lead to the utter ruin of the holder, and yet such damage could not be considered as necessarily resulting from the breach of contract, so as to entitle the party aggrieved to recover in respect of it. Take the case of the breach of contract to supply a rick-cloth, whereby and in consequence of bad weather, the hay being unprotected is spoiled, that damage would not be recoverable. Many similar cases might be added. The true principle to be deduced from the authorities upon this subject is that which is embodied in the maxim: "*In jure non remota causa sed proxima spectatur.*"

Sedgwick says, (p. 38,) "In regard to the quantum of

damages, instead of adhering to the term compensation, it would be far more accurate to say, in the language of Domat, which we have cited above, "that the object is to discriminate between that portion of the loss which must be borne by the offending party, and that which must be borne by the sufferer. The law, in fact, aims not at the satisfaction but a division of the loss." And the learned author also cites the following passage from Broom's Legal Maxims: "Every defendant," says Mr. Broom, "against whom an action is brought, experiences some injury or inconvenience beyond what the costs will compensate him for." Broom's Legal Maxims, p. 95; *Davis v. Jenkins*, 11 M. & W. 755. Again, at p. 78, after referring to the case of *Flureau v. Thornhill*, 2 W. Bl. 1078, he says, "Both the English and American courts have generally adhered to this denial of profits as any part of the damages to be compensated, and that whether in cases of contract or of tort." So, in case of illegal capture, Mr. Justice Story rejected the item of profits on the voyage, and held this general language: "Independent, however, of all authority, I am satisfied, upon principle, that an allowance of damages upon the basis of a calculation of profits is inadmissible. The rule would be in the highest degree unfavorable to the interests of the community. The subject would be involved in utter uncertainty. The calculation would proceed upon contingencies, and would require a knowledge of foreign markets to an exactness, in point of time and value, which would sometimes present embarrassing obstacles; much would depend on the length of the voyage, and the season of arrival; much upon the vigilance and activity of the master, and much upon the momentary demand. After all, it would be a calculation upon conjectures and not upon facts; such a rule, therefore, has been rejected by courts of law in ordinary cases, and, instead of deciding upon the gains or losses of parties in particular cases, a uniform interest has been applied as the measure of damages for the detention of property."

There is much force in that admirably constructed passage. We ought to pay all due homage in this country to the decisions of the American courts upon this important subject, to which they appear to have given much careful consideration. The damages here are too remote.

Several of the cases which were principally relied upon by the plaintiffs, are distinguishable. In *Waters v. Tow-*

ers, 1 Exch. 401, there was a special contract to do the work in a particular time, and the damage occasioned by the non-completion of the contract, was that to which the plaintiffs were held to be entitled.

In *Borradaile v. Brunton*, 8 Taunt. 535, there was a direct engagement that the cable should hold the anchor. So in the case of taking away a workman's tools, the natural and necessary consequence is the loss of employment. *Bodley v. Reynolds*, 8 Q. B. 779. The following cases may be referred to as decisions upon the principle within which the defendants contend that the present case falls: *Jones v. Gooday*, 8 M. & W. 146; *Walton v. Feathergill*, 7 Car. & P. 392; *Boyce v. Bayliffe*, 1 Camp. 58; and *Archer v. Williams*, 2 C. & K. 26. The rule, therefore, that the immediate cause is to be regarded in considering the loss, is applicable here. There was no special contract between these parties.

A carrier has a certain duty cast upon him by law, and that duty is not to be enlarged to an indefinite extent in the absence of a special contract, or of fraud or malice. The maxim, "*dolus circuitu non purgatur*," does not apply. The question as to how far liability may be affected by reason of malice forming one of the elements to be taken into consideration, was treated of by the Court of Queen's Bench, in *Lumley v. Gye*, 2 E. & B. 216. Here the declaration is founded upon the defendants' duty as common carriers, and indeed there is no pretence for saying that they entered into a special contract to bear all the consequences of the non-delivery of the article in question. They were merely bound to carry it safely, and to deliver it within a reasonable time. The duty of the clerk, who was in attendance at the defendants' office, was to enter the article, and take the amount of carriage; but a mere notice to him, such as was here given, could not make the defendants, as carriers, liable as upon a special contract. Such matters, therefore, must be rejected from the consideration of the question. If carriers are to be liable in such a case as this, the exercise of a sound judgment would not suffice, but they ought to be gifted also with a spirit of prophecy. "I have always understood," said PATTESON, J., in *Kelly v. Partington*, 5 B. & Ad. 651, "that the special damage must be the natural result of the thing done." That sentence presents the true test.

The Court of Queen's Bench acted upon that rule in *Foxall v. Barnett*, 2 E. & B. 928.

This, therefore, is a question of law, and the jury ought to have been told that these damages were too remote; and that in the absence of the proof of any other damage, the plaintiffs were entitled to nominal damages only. *Tindall v. Bell*, 11 M. & W. 232; *Siordet v. Hall*, 4 Bing. 607; and *De Vaux v. Salvador*, 4 Ad. & E. 420, are instances of cases where the courts appear to have gone into the opposite extremes; in the one case of unduly favoring the carrier, in the other, of holding him liable for results which would appear too remote. If the defendants should be held responsible for the damages awarded by the jury, they would be in a better position if they confined their business to the conveyance of gold. They cannot be responsible for results which, at the time the goods are delivered for carriage, are beyond all human foresight. Suppose a manufacturer were to contract with a coal merchant, or mine owner, for the delivery of a boat-load of coals, no intimation being given that the coals were required for immediate use, the vendor in that case would not be liable for the stoppage of the vendee's business, for want of the article which he had failed to deliver; for the vendor has no knowledge that the goods are not to go to the vendee's general stock. Where the contracting party is shown to be acquainted with all the consequences that must, of necessity, follow from a breach on his part of the contract, it may be reasonable to say that he takes the risk of such consequences. If, as between vendor and vendee, this species of liability has no existence, *à fortiori*, the carrier is not to be burthened with it. In cases of personal injury to passengers, the damage to which the sufferer has been held entitled, is the direct and immediate consequence of the wrongful act. *Cur. adv. vult.*

The judgment of the court was delivered by

ALDERSON, B. — We think that there ought to be a new trial in this case; but in so doing, we deem it to be expedient and necessary to state explicitly the rule which the judge at the next trial ought, in our opinion, to direct the jury to be governed by when they estimate the damages.

It is, indeed, of the last importance that we should do this; for if the jury are left without any definite rule to guide them, it will, in such cases as these, manifestly lead to the greatest injustice. The courts have done this on

several occasions ; and in *Blake v. Midland Railway Company*, 21 L. J., Q. B. 237, the court granted a new trial on the very ground, that the rule had not been definitely laid down to the jury by the learned judge at *Nisi Prius*.

"There are certain established rules," this court says, in *Alder v. Keighley*, 15 M. & W. 117, "according to which the jury ought to find." And the court in that case adds: "And here there is a clear rule, that the amount which would have been received, if the contract had been kept, is the measure of damages if the contract is broken." Now, we think the proper rule in such a case as the present, is this: Where two parties have made a contract, which one of them has broken, the damages which the other party ought to receive, in respect of such breach of contract, should be such as may fairly and reasonably be considered either arising naturally, *i. e.* according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made, were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances, so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract, by special terms, as to the damages in that case ; and of this advantage it would be very unjust to deprive them. Now, the above principles are those by which we think the jury ought to be guided, in estimating the damages arising out of any breach of contract. It is said that other cases, such as breaches of contract in the non-payment of money, or in the not making a good title to land, are to be treated as

exceptions from this, and as governed by a conventional rule. But as, in such cases, both parties must be supposed to be cognizant of that well known rule, these cases may, we think, be more properly classed under the rule above enunciated, as to cases under known special circumstances, because there both parties may reasonably be presumed to contemplate the estimation of the amount of damages, according to the conventional rule. Now, in the present case, if we are to apply the principles above laid down, we find that the only circumstances here communicated by the plaintiffs to the defendants, at the time the contract was made, were, that the article to be carried was the broken shaft of a mill, and that the plaintiffs were the millers of that mill. But how do these circumstances show reasonably that the profits of the mill must be stopped by an unreasonable delay in the delivery of the broken shaft, by the carrier, to the third person?

Suppose the plaintiffs had another shaft in their possession, put up, or putting up at the time, and that they only wished to send back the broken shaft to the engineer who made it, it is clear that this would be quite consistent with the above circumstances, and yet the unreasonable delay in the delivery would have no effect upon the intermediate profits of the mill. Or again, suppose that, at the time of the delivery to the carrier, the machinery of the mill had been in other respects defective, then also the same results would follow. Here it is true that the shaft was actually sent back to serve as a model for a new one, and that the want of a new one was the only cause of the stoppage of the mill, and that the loss of profits really arose from not sending down the new shaft in proper time, and that this arose from the delay in delivering the broken one to serve as a model. But it is obvious that, in the great multitude of cases of millers sending off broken shafts to third persons, by a carrier, under ordinary circumstances, such consequences would not, in all probability, have occurred; and these special circumstances were here never communicated by the plaintiffs to the defendants.

It follows, therefore, that the loss of profits here cannot reasonably be considered such a consequence of the breach of contract, as could have been fairly and reasonably contemplated by both the parties when they made this contract. For such loss would neither have flowed naturally from the breach of this contract, in the great multitude of

such cases occurring under ordinary circumstances, nor were the special circumstances, which perhaps would have made it a reasonable and natural consequence of such breach of contract, communicated to or known by the defendants. The judge ought therefore to have told the jury that, upon the facts then before them, they ought not to take the loss of profits into consideration at all, in estimating the damages.

Rule absolute.

Abstracts of Recent American Decisions.

Supreme Judicial Court of Massachusetts, for Franklin, Hampshire and Hampden, held at Northampton, September Term, 1854.

Allowance to Widow — Appeal from Decree of Judge of Probate. Petition for leave to enter an appeal from decree of Judge of Probate, making the petitioner a first allowance, after the expiration of — months. Appeal from decree making a second allowance to a widow.

*Held, (THOMAS, J.)*¹ The whole power of the Judge of Probate as to an allowance now depends on Stat. 1838, ch. 145; that statute does not restrict him from making a second allowance, or a second grant, which may be treated as a part of the first allowance.

In this case, however, the widow received the first allowance. She could not then appeal. Besides, here was no accident or mistake. Here was an election of the party to accept. Again, this petition was entered in the Registry of Probate; it should have been in the clerk's office. Petition dismissed.

As to the decree making a second allowance, in point of fact the administrator had proceeded in the settlement of the estate, and exhausted the personal property. There can be no allowance made from the proceeds of the real estate, because Rev. Stat. ch. 74, sect. 31, provide that when there is a surplus, such funds are real estate. Decree reversed. — *Hale, pet'r; Same, app't.*

Burden of Proof — Evidence — Juror — Practice — Issue. Action on a policy of insurance against fire. The defence was, that the fire was set by the plaintiff, and was his own fraudulent and wilful act. The plaintiff's counsel contended that the defendants must satisfy the jury of this beyond any reasonable doubt, in order to be entitled to a verdict. The court below instructed the jury that it would be sufficient if they, as reasonable men, were fully satisfied of the truth of the allegation. There was no evidence as to the character of the plaintiff; but the plaintiff's counsel, in his closing argument, alluded to matters not in evidence, for the purpose of impressing upon the jury the conviction that the plaintiff's character was so good that he would not be likely to have committed the act charged. The court below instructed the jury that the plaintiff's character was not necessarily involved in the issue, and that it was not necessary

¹ Delivering the opinion of the Court.

for the defendant to prove that the plaintiff had committed any crime; it would be sufficient to prove that he had purposely or wantonly burnt the property insured, and this might have been done, the property being his own house, and on his own land, without committing any crime. There was no evidence as to the character for truth of any of the defendant's witnesses; but the plaintiff's counsel having stated his belief that some of the jury knew personally that two of these witnesses were unworthy of belief, the court instructed them that none of them had any right to act upon their private knowledge of particular facts, but if any one had such knowledge, he should be sworn as a witness. The verdict was for the plaintiff, and on exceptions it was *held*, (Dewey, J.): 1. That in one view the instruction given might be too favorable for the plaintiff, because it assumed that the general burden was on the defendants; while the general burden was on the plaintiff, to show a loss within the policy; but that when an issue is raised in a civil action, it is not necessary to prove any matter upon that issue, beyond a reasonable doubt. There is a distinction, in this respect, between criminal and civil cases. 2. In an action of contract, where the defence involves a charge of fraud, character is not brought in issue, and neither party can call witnesses to character; and in this case it was not necessary for the defendants to prove a crime. 3. If any juror has personal knowledge, he must be called as a witness. Exceptions overruled. — *Schmidt v. New York Union Ins. Co.*

Burden of Proof—Issue—Evidence. Action on a note, alleged to have been given for three hundred dollars. The note, on being produced, appeared to be for three hundred dollars, and it was left to the jury to say whether this meant three hundred. The declaration alleged that a demand was made, and the defendant contended that this being alleged, must be proved, but the court ruled otherwise. The defendant specified in defence among other things that the note was given without consideration; and a question arose as to the burden of proof. *Held*, (Shaw, C. J.) that the first two instructions were right; and as to the last, that the production of the note made a *prima facie* case for the plaintiff, which would stand until drawn in question by the proof on the other side. — *Burnham v. Allen*.

Common Carriers—Forwarders—Contract. Action against defendants as common carriers for two boxes described in the receipt. The receipt was as follows:

“Northampton, Mass., Feb'y 27, 1851.

“Rec'd of E. Nutting for transportation to New York, nine boxes planes, marked R. & F., 21 Platt street, N. Y. Four boxes planes and handles, marked G. F. Hewlett, 146 Bowery, N. Y. Fred. W. Clarke, agent.”

The defendants were common carriers only to Springfield in this State: and there connected with other railroad lines to New York. The thirteen boxes were carried to Springfield and there safely delivered to the next company, and two of them were lost afterwards. The defendants receive pay only for transportation over their own line. *Held*, (Metcalf, J.) that the defendants' obligation was to carry the boxes to Springfield, and there safely deliver them to be forwarded; and the law would not hold them responsible for the negligence of another railroad company, unless by special contract; and the court did not construe the above receipt as a special contract to carry them beyond Springfield. Judgment for defendants. — *Nutting v. Connecticut R. R. Co.*

Common Seller. See *Evidence*. **Evidence—Licensed Innkeeper.** Conviction for being a common seller. There was evidence that the defendant kept a public house and had an innkeeper's sign. It was objected that this evidence was irrelevant. *Held*, (Thomas, J.) that as under the

statute a man may be licensed as an innkeeper, this fact is no evidence to show that he was a common seller. His license as an innkeeper prohibits him from selling liquors, and there is no presumption that he violates his license, but the contrary. New trial granted. — *Commonwealth v. Madden*.

Confession. See *Evidence*.

Contract. See *Common Carriers*. *Sale — Fraud — Infancy.* Tort, for conversion of a cow. The defendant proposed to buy a cow of the plaintiff; and the plaintiff during the negotiation was made drunk by an agent of the defendant. A note was given for the cow, which was sued, and the defendant set up the plea of infancy and prevailed in that suit. The defendant then sold the cow. The plaintiff made a demand, and recovered a verdict for the value of the cow in the C. C. P. *Held*, (Thomas, J.) that the facts showed that there was no valid contract of sale between the parties; the defendant obtained possession of the cow by fraud; the contract was voidable, with this peculiarity, that it might be avoided by either party. It needed a double confirmation. The defendant never affirmed it, and so the contract never became binding; and no title passed by the original transaction; and to this action, founded on the defendant's obtaining possession by fraud, infancy was no defence. — *Walker v. Daris*.

Disturbance of Public Meeting — Indictment. Conviction under Stat. 1849, ch. 59, for disturbing a temperance meeting. There was a motion to quash the indictment, and also a motion in arrest of judgment, on the ground that the indictment charged no offence. It was contended by the defendants that the language of the statute is applicable only to meetings which are recognized by our laws as schools are — that is, meetings which are made necessary by the law for the exercise of the legal rights and duties of citizens. *Held*, (Shaw, C. J.) that in this Commonwealth, the right of the people to assemble and consult upon the common good is guaranteed by the Constitution; that a lawful purpose is a purpose warranted by the Constitution and laws; and the people have a right to meet and discuss the temperance laws, and are protected in so doing. And it is no objection that this construction of the statute may extend to political meetings, and even to amusements. Even theatres are lawful assemblies. And if it were held otherwise, clubs might be formed to put an entire end to all such meetings. — *Commonwealth v. Porter*.

Evidence. See *Common Seller*. *Burden of Proof — Common Seller.* Conviction for being a common seller. There was evidence of barrels being moved into defendant's cellar, and the teamster told a witness, in the presence of the defendant, that the barrels contained gin. To this evidence the defendant objected. *Held*, (Merrick, J.) that in relation to the declaration of the teamster, the ruling that this could not be considered by the jury, unless heard by the defendant, thereby implying that if heard by defendant, it might be considered as an admission, was not strictly correct. Not every remark made in the hearing of a defendant is admissible in evidence. His participation in the conversation, or some other circumstance, calling for comment or denial on his part, must be shown. New trial granted. — *Commonwealth v. Lu Hart*.

Evidence — Way. Action for damages from a defect in a road. The defendants offered to prove that, prior to the injury, different persons going over the road had met or passed others without collision or accident. The court below admitted the evidence to show the width of the road, and that it was not defective in respect to width. *Held*, (Shaw, C. J.) that the evidence was not rightly admitted, but comes within the principle of *Collins v. Dorchester*, 6 Cush. 396, which was decided on right and sound principles. The verdict, which was for the defendants, was set aside. — *Warwick v. Pelham*.

Evidence — Confession. Conviction for larceny. Certain confessions were in evidence, which were objected to on the ground that they were obtained by solicitations, &c. *Held*, (Shaw, C. J.) that any thing coming from a prisoner is to be watched to see that it does not come from undue influence. The reason is that he may be led to confess what is not true. It is a question for the court, in each case, to consider if the evidence is competent. In this case there was no promise; no offer of any advantage; no threat. The prisoner was told that it would make no difference, but that all the proceedings would be the same. And the exceptions were overruled. — *Commonwealth v. Morey*.

Forwarders. See *Common Carriers*.

Fraud. See *Contract*.

Indictment. See *Disturbance of Public Meeting*.

Infancy. See *Contract*.

Innkeeper licensed. See *Common Seller*.

Issue. See *Burden of Proof*.

Juror. See *Burden of Proof*.

Mortgage. Real action upon a mortgage with this condition: "The condition of this obligation is such, that whereas the above named Hannah, (the demandant,) has this day by deed conveyed to the said Nathaniel K. (the tenant,) the above mentioned premises for her future maintenance and support; and whereas the said Nathaniel K. has at the same time reconveyed the said premises to said Hannah as security for such maintenance and support; now if the said Nathaniel K., his heirs, &c., well and truly maintain the said Hannah, &c., then the above obligation shall be void," &c.

The action was brought before condition broken, for possession merely. The defendant contended that the above condition was in effect an agreement by the plaintiff that the defendant should remain in possession until condition broken; and the court, (Metcalf, J.) so held, adopting the principle of *Clay v. Wren*, 34 Maine, 187. Judgment for defendant. — *Wales v. Mellen*.

Pauper. Action to recover for the support of a pauper. The pauper was furiously insane, and the plaintiffs sent her to Brattleboro', Vermont. The defendants claimed that in no case could there be a recovery, under the statute, for expenses incurred out of the State. The plaintiffs argued that this was a case of urgent necessity. *Held*, (Shaw, C. J.) that the plaintiffs had no right to send the pauper out of Massachusetts. There is a provision by which the plaintiffs might have availed themselves of the State Institution at Worcester. The pauper must be kept in a situation to be removed. This could not be done if she was out of the State. Judgment for defendants. — *Deerfield v. Greenfield*.

Practice. See *Burden of Proof*.

Sale. See *Contract*, and *Stat.* 1852, c. 322.

Stat. 1852, ch. 322 — *Liquor Law — Sale.* Action to recover for liquors sold. The defendant sent an order for liquors to one J. F. Orcutt at Hartford. J. F. Orcutt had sold out to C. C. Orcutt, who filled the order with the assent of J. F. Orcutt, (except a slight variance in quantity,) and sent the liquors by a carrier to the defendant in Massachusetts, and sent the defendant a bill with a letter notifying him of the facts. The defendant, having received this bill and letter, took the liquors and paid the freight. The defendant contended that even if the sale was made in Connecticut, the plaintiff could not recover under the 19th section of the law of 1852; but that upon these facts the sale was in Massachusetts. The verdict was for the plaintiff. *Held*, (Shaw, C. J.) that there is nothing in that clause of the statute to prohibit an action for a sale of

liquors made out of this State. On the question whether the sale was made in Massachusetts or Connecticut, it seemed, on the whole, more consistent to say, the course of the defendant was a waiver of the exception. The plaintiff undertook to execute the order as an original order to himself, and the defendant with knowledge acquiesced. This related back and made a sale in Connecticut, and the plaintiff was entitled to judgment. — *Orcutt v. Nelson.*

Way. See Evidence.

Miscellaneous Intelligence.

LAW REFORM IN ENGLAND. — Doubtless our readers were surprised to learn from the parliamentary return of the business of the Common Law Courts, that there has been so considerable an increase of its amount since the various reforms that have been effected by the Procedure Act and the Evidence Act. Not only have more actions been commenced, but more have been tried; and the most unexpected result has been exhibited of an increase in the business of the County Courts almost equal in amount to the increase in the Superior Courts. From this the satisfactory conclusion is to be drawn that the County Courts have not been flourishing at the expense of the Superior Courts; that the enormous business transacted there is almost a new creation—an addition to the previous legal business of the country, produced by the facilities thus provided for the recovery of debts and the settlement of small disputes. Again, it is apparent from the return that there is no truth in the current report that, since the reform in the Common Law Courts, they had won back again, by the superior facilities they now offer, the business that had been spirited from them by the rivalry of the County Courts. Contrary to the general belief, in which we shared, it now appears that the Superior Courts have added largely to their business, without taking from the County Courts; for the increase of the former has been attended by an increase in the latter also. Perhaps the true explanation is, that the County Courts created a new business for themselves, by enabling an enormous mass of persons to have justice, to whom it was previously denied by its cost and hazards; so now the reformed procedure of the Superior Courts has made a new business for them, by introducing a numerous class of cases to which justice was previously inaccessible, because difficulties of pleading or of evidence, now removed, stood in the way and forbade access. If this be the right explanation, it is most encouraging to rational reformers, and it will be the best assurance to the profession that real reforms—practical measures, devised by practical men, for improving the law—will positively promote the pecuniary interests of the lawyers. — *Law Times*, Sept. 2.

The return of the business of the Common Law Courts during the last three years—from which we have already gleaned a great deal of interesting information, showing what is the actual condition of the practice, and proving by figures which are indisputable that, so far from declining, it is actually increasing in quantity—supplies a few further facts that are worth the reader's attention.

The business done by the Queen's Bench *in banco*, during the three years, is as follows. In 1851, the number of cases argued was 321; in 1852, 254; and in 1853, 210. This diminution has been in the special paper and in rules other than new trials; for, curiously enough, these have been the same in each of the three years, viz., 64, 65, and 64. The consequence of this is, that the Court has found it necessary to sit *in banco* fewer days out of term. In 1851, it held eleven such sittings; in 1853,

only three. In like manner the rules argued on the Crown side have declined from 115 to 69, and those in the Crown Paper from 66 to 48.

These figures completely establish the correctness of a prophecy upon which we adventured when the reforms in procedure were commenced, that their effect would be to increase the number of actions *brought*, and of actions *tried*, and consequently the business of the Attorney; but that it would greatly diminish the amount of business *in banco*, and consequently the business of the Barrister. The facts are precisely in accordance with this anticipation. Almost all that mass of business transacted by Counsel between the commencement of an action and the trial,—the pleadings, special demurrers, signing of pleas, motions, which maintained the Juniors,—have been swept away; and nothing now remains for counsel but advising on evidence, arguing a demurrer, and the trial, in all of which prudent attorneys will not employ Juniors, because they cannot possess sufficient knowledge, and that which is of more value than learning, experience. Such a consequence was not difficult to be foreseen; nevertheless, so unwilling are men to look inconvenient facts in the face, few of the Juniors at the Bar would admit the truth of those observations. They hoped on still; but perhaps the Parliamentary paper will work a conviction which cannot be entertained too soon for their own future welfare. Let those who have not fortune to sustain them, or extraordinary sources for supply of business, not waste the best years of their lives in a pursuit which is now shown to be hopeless. — *ib.*, Sept. 16.

The new Legal Year begins on Thursday next; and the Court papers which will be found in another page, exhibit an unprecedented aspect. They have not been so brief within the memory of any living Lawyer. The arrears of the Common Law Courts are but 46 in all. Of these, 22 are in the Queen's Bench; 12 in the Common Pleas; and 12 in the Exchequer. The Queen's Bench arrears consist of 3 new trials, 14 in the Special Paper, and 5 enlarged rules; those of the Common Pleas are 1 new trial, and 5 rules in the Remanet Paper, 3 standing for judgment, and 3 demurrers; those of the Exchequer comprise 1 in the Peremptory Paper, 4 in the Special Paper, 3 new trials standing for judgment, and 4 for argument.

It is very manifest, then, that what is called *banc* business—that is to say, that portion of litigation which consists in the forms of procedure, or in disputed law—has greatly diminished since procedure has been simplified. Up to this point there must have been a steady decline in the *banc* business of the Common Law Bar, and an enormous decrease in its annual revenue from that source. Upon the juniors the loss has fallen with especial severity, for the fees extinguished were chiefly those which fell to the lot of the juniors. In procedure, indeed, questions are now so rare, that the reports of an entire term do not produce half a dozen. As these, however, have declined, so questions of law, which come chiefly in the shape of motions for new trials, have increased, and will continue to do so with the increase of trials, which in their turn are promoted by the simplification of the procedure. But then these do not compensate to the junior Bar for the fees they have lost by the reforms in procedure, because, for such questions in law as are raised either by special case, or demurrer, or motion for new trial, juniors are not employed. The suitor very wisely prefers to retain the experience and knowledge of the most practised men. Thus the leaders have lost nothing by the recent reforms; probably they have gained somewhat, and may anticipate more.

So much for the past. But the future is not so certain. There are provisions in the new Procedure Act which possibly, nay probably, may produce a considerable amount of business for the Bar. There will be fewer technicalities; but there will be more need than ever for discretion, com-

mon sense, and the exercise of ingenuity. The new processes will be productive of many doubts and difficulties for some time, until their forms and limits are settled by judicial decision; and therefore we are inclined to agree with those who anticipate an increase in the business of the Common Law Courts.—*Id.*, Oct. 28.

Insolvents in Massachusetts.

Name of Insolvent.	Residence.	Commencement of Proceedings	Name of Commissioner.
Abbott, John E.	Boston,	Oct. 28, 1854,	John M. Williams.
Bell, William	Coleraine,	" 17,	David Atken.
Beverley, William E.	Abington,	" 23,	Welcome Young.
Billings, John	Lowell,	" 5,	Isaac S. Morse.
Brickett, Nathan A.	Roxbury,	" 13,	Francis Hilliard.
Brigham, Hubbard H.	Fitchburg,	" 5,	Alexander H. Bullock.
Russell, William C.	Charlestown,	" 2,	Isaac S. Morse.
Cook, Robert ¹	Scituate,	" 14,	Welcome Young.
Dale, Loring C.	Boston,	" 19,	John P. Putnam.
Downing, Oliver H.	Boston,	" 16,	John P. Putnam.
Evans, John O. ²	Newton,	" 10,	Josiah Rutter.
Faxon, Asaph S.	Quincy,	" 13,	Francis Hilliard.
Felt, Edward J.	Wrentham,	" 10,	Francis Hilliard.
Field, Eustace	Bridgewater,	" 20,	Welcome Young.
Flint, Joseph P.	Danvers,	" 18,	John G. King.
Fuller, Charles	Oxford,	" 31,	Alexander H. Bullock.
Gilman, Charles E.	Somerville,	" 16,	John P. Putnam.
Greely, Joseph ³	Boston,	" 13,	John M. Williams.
Harrison, Thomas	Boston,	" 4,	John P. Putnam.
Haskoll, George S.	Chelsea,	" 26,	John P. Putnam.
Hepworth, George	Boston,	" 9,	John P. Putnam.
Hill, John B.	Quincy,	" 13,	Francis Hilliard.
Holbrook, Horatio N.	Medfield,	" 18,	Samuel B. Noyes.
Joy, Laban	Braintree,	" 30,	Samuel B. Noyes.
Kendrick, Thomas D.	Boston,	" 3,	John P. Putnam.
Knapp, Daniel F.	New Braintree,	" 15,	Charles Brimblecom.
Lawrence Carpet Company,	Boston,	" 13,	John P. Putnam.
Lyman, Theodore	Boston,	" 16,	John M. Williams.
McDonough, Joseph	Boston,	" 18,	John P. Putnam.
McLaughlan, Lawrence	Newton,	" 9,	Asa F. Lawrence.
Neill, Henry	Lynn,	" 3,	John G. King.
Nye, Harrison G. O.	Marion,	" 27,	Welcome Young.
Olds, Joseph S.	North Adams,	" 16,	Shepard Thayer.
Pease, Lewis D. ⁴	Lowell,	" 16,	Isaac S. Morse.
Peirce, Cyrus	Lowell,	" 23,	Isaac S. Morse.
Pue, James W. ⁵	Newton,	" 16,	Josiah Rutter.
Rhodes, Robert ⁵	Dorchester,	" 21,	Samuel B. Noyes.
Rhodes, William K. ⁵	Dorchester,	" 21,	Samuel B. Noyes.
Robinson, Leonard ⁴	Lowell,	" 16,	Isaac S. Morse.
Russell, Erastus F. et al.	Great Barrington,	" 23,	Charles N. Emerson.
Smith, William	Boston,	" 26,	John P. Putnam.
Staples, Linus B.	Uxbridge,	" 9,	Alexander H. Bullock.
Stevens, Leander	Boston,	" 16,	John P. Putnam.
Story, Edward A.	Brighton,	" 27,	Asa F. Lawrence.
Tilton, Jeremiah G.	Cambridge,	" 31,	Asa F. Lawrence.
Warfield, Lawson	Sutton,	Sept. 7,	T. G. Kent.
Warren, John	Boston,	Oct. 23,	John P. Putnam.
Warren, John B.	Lowell,	" 11,	Asa F. Lawrence.
Waterman, Charles H.	Sandwich,	" 30,	Timothy Reed.
Whittaker, Freedom	Malden,	Aug. 31,	Josiah Rutter.
Wilbur, Henry S.	Medway,	Oct. 10,	Samuel B. Noyes.
Wilkins, Charles ⁵	Boston,	" 13,	John M. Williams.
Winship, Francis L.	Brighton,	" 7,	Asa F. Lawrence.
Woodworth, Wm. J.	Great Barrington,	" 23,	Charles N. Emerson.
Woodworth, Wm. J. et al.	Great Barrington,	" 23,	Charles N. Emerson.
Wright, Charles S.	Charlestown,	" 31,	Asa F. Lawrence.

¹ Late firm of R. & R. Cook.

² Evans & Pue.

³ Charles Wilkins & Co.

⁴ Leonard Robinson & Co.

⁵ Rhodes & Co.

THE
MONTHLY LAW REPORTER.

JANUARY, 1855.

LIFE AND WORKS OF FISHER AMES.¹

THE written lives of great men are truly invaluable. If fairly and properly presented, there is no class of writing so useful, and which certainly loses nothing in this respect, by being usually entertaining as well as instructive. And we suppose, that nothing tends so much to keep up society, and to check that downward tendency, to which, by the law of nature, all human things are subject, as the example and instruction afforded by biographies of the illustrious departed. We are the more disposed to offer this consideration to the attention of our readers, because in our day a great deal has been said in derogation of what some have denominated "hero-worship;" especially by those who are willing to forget that the elements of great character, after all, must be great qualities; and who can, necessarily, offer us, as a substitute, qualities, not generally counted so well worthy of our respect and admiration. We confess, for our own part, we prefer to worship heroes, rather than those who have no title to any such appellation.

The reasons which go to constitute the sound basis, upon which our views on this subject are founded, seem to us almost too obvious to require much effort at elucidation. The framework of human society, as we have already suggested, is not kept moving in regular order, and subject to just influences, by the mere operation of its own fric-

¹ Works of Fisher Ames. With a Selection from his Speeches and Correspondence. Edited by his Son, Seth Ames. Boston: Little, Brown & Company. 1854.

tion. On the contrary, if human affairs were left entirely to the management of those who, unhappily, possess no heroic tendencies, we apprehend that their ordinary pursuits would descend very low in the scale of dignity and honor, and whatever else tends to promote the improvement and elevation of the race. In a word, it is really great men, and not petty men, — men of noble minds and generous sympathies and elevated views and exalted talents, — those whose impulses and principles and aspirations conduct them honorably along the high and difficult paths of public service, — who undoubtedly deserve, as they have generally enjoyed, the peculiar respect and gratitude of mankind.

It sometimes happens, however, in the decay of States, under popular institutions, that men of no great ability or honor get the upper hand. In the midst of public factions and the jealousies and rivalries of political conflicts, hordes of the least deserving often become ambitious. The presumption of such persons is usually on a par with their ignorance, and they are unscrupulous, just in proportion as they are deficient in the higher sentiments, which control the conduct of better men. They are thus able, by means of combination and the impulse of common though selfish interest, to carry their objects into effect, and to exclude from the conduct of affairs those who are most able to understand and to manage them the best. The consequence always has been, and always will be, that a flood of degeneracy will sweep over the surface of society ; and unless checked by better influences, a nation, once enlightened, cultivated, generous and free, may become in the progress of time, as has often proved to be the case, degraded into barbarism, or supple slaves to the worst and meanest tyrants.

This, we observe, is an imperfect summary of Mr. Ames's political principles and opinions, for which some people saw fit, in his day, to stigmatize him as an aristocrat. In this view, and for the example and warning of other times, we conceive that his son has now conferred a real benefit on the public, by preparing this memorial of his illustrious father. For FISHER AMES was, unquestionably, a great man ; of the true, old-fashioned, sterling, devoted stamp. Not, certainly, that we mean to be understood as alleging, that either he, or his contemporaries, were quite free from errors and defects, which, in his case, it might be difficult to point out, but with which public men, in all ages and countries, have been more or less chargeable. Of one thing

we are sorry to feel a clear confidence, that the standard of public obligation and the tone of public honor were altogether higher in his day than in our own ; that the scale of generous patriotism had not generally been permitted a descent so low, and at the same time so safe, as more modern times have witnessed ; and that political corruption as yet duly paid its decent and respectful external homage to public integrity. In a word, no one ever doubted, that we ever heard of, that Fisher Ames was an honest man ; true to his principles, his conscience, his country and his Maker ! Throughout the great administration of Washington, during a period which, as Mr. Ames himself has admirably characterized it, — “ that government was administered with such integrity, without mystery, and in so prosperous a course, that it seemed wholly employed in acts of beneficence,” — and in subsequent more stormy times, — side by side with men of powerful character and exalted ability, whose energies had been developed and concentrated, and vivified, amidst the stirring events of the revolution, — Mr. Ames was always seen in the front rank, and there he was seen, to the last, without a stain. We once heard one of his contemporaries who knew him well say, “ Every body loved him.” What a character is this ! Better than fame, and more to be desired than the proudest rewards of all human ambition. To have passed through the troubled scenes of an eventful life, and the fierce, rancorous, unsparing conflicts of political warfare, with the general good-will, affords surely the highest testimonial, not merely of the excellent kindness of his heart, but of the sincere, unflinching and unsuspected uprightness of his character and life.

This is clearly no place, in which to indulge in speculations upon the principles of the great party, which he so long aided to conduct, with an ability, kindred, at least, to the highest genius, and a sagacity often prophetic, from the directness and singleness of purpose with which he regarded public affairs. But the nature of these doctrines, in their general scope, and often in their minute details, and the earnest sincerity, which signalized his devotion to their elucidation and support, are sufficiently developed in the pages of these volumes.

We have styled Mr. Ames *illustrious*, and his title to be thus distinguished we believe will be more fully acknowledged, the more closely they are investigated. They

are, it is certain, of that solid character, which will bear the substantial test of time. The too narrow space, which our own pages allow us to afford to the notice of these handsome volumes, is due to the character of Mr. Ames, as an ornament to the profession of the Law; though the exigencies of the times, as well as his own inclinations, unquestionably, enlarged him into a statesman, instead of permitting the devotion of his life to the drudgery, or even to the higher pursuits of the Bar.

The volumes are introduced by that elegant and feeling sketch of Mr. Ames's life, prepared by the late President Kirkland, which has long been held one of the noblest tributes ever paid by one good man to the memory of another. This is followed by the "Letters," invaluable, of course, as sources of illustration of the public and private history of the times; and the second volume is made up of the political speeches and political essays of Mr. Ames. It is not our province to pronounce upon writings and oratorical efforts, which have, long since, taken their place in the public estimation. The Letters, now collected and published for the first time, constitute a new element of interest, and entitle the editor to our gratitude, for this highly valuable portion of his filial work. Our own publication is so exclusively devoted to the exposition of legal principles and the annals of judicial tribunals, that we are unable to devote any space to the consideration of the life and public character of Mr. Ames. This is the less necessary, however, by reason of the existence of that succinct and delightful personal sketch, by Dr. Kirkland, already alluded to.

The letters of Mr. Ames, however, we wish to remark, are of very great value. They run through the long period from 1789 to 1807; including, therefore, a series of years filled with events of the highest consequence, both to this country and to Europe, and covering that tract of time, in which the principles of our own government were most thoroughly examined, settled and established. They are written mostly off-hand, in an easy, agreeable style, without any apparent deliberate attempt at artificial construction. Indeed, they are all addressed to his familiar friends, who were all men of mark in their day and generation. It constitutes their charm very much, therefore, as well as their value, that personal allusions, often to those of whose private life we cannot hear too much, and suggestions in regard to domestic affairs, of which more than we could

wish appears to have been omitted, — are interspersed with discussions of public affairs, discriminating touches upon the motives and characters of public men, comments upon the temper and spirit of the people, forebodings, sometimes too soon realized, and ardent hopes and aspirations for the welfare of his country, generally far more than fulfilled. They present Mr. Ames in an aspect so attractive, through all the relations of life, as fairly to challenge credence to the remark of our venerable friend, that “every body loved him.” The body of one of these letters we quote below. It is, it will be seen, upon subjects kindred to our own pages. It throws some light upon the character of Mr. Ames, as a lawyer, and presents, in a striking view, his strong and sagacious sense, — indeed, it is actually prophetic in its judgments upon his contemporaries, — and, in all respects, may be of service to members of the profession, in our own day. It is dated at Dedham, Mr. Ames’s residence, October 5, 1802, and is addressed to Christopher Gore, afterwards Governor of Massachusetts, as we suppose on the eve of his return from London to his native city, Boston. We would suggest, that a few more notes to these letters might be of use, and would save the trouble to their readers of tiresome research into contemporary documents.

“You ask my advice about resuming the law business. I cheerfully undertake the office, only premising that in deciding the most momentous concerns of life, a man is not only his best, but almost solely, his own adviser. He has exclusively that instinctive perception of what he prefers, and of what he can do, that the most discerning friend must only suppose, and may, and indeed must, in a great measure mistake. Nevertheless, friends ought to advise, because they bring this power of *self-judging* into operation *precisely*, and with ample materials. All I will pretend to do is to frame a special verdict, and then humbly submit it to your honor’s judgment.

“Great law knowledge is sure to gain business and emolument. The splendid eloquence that displays its treasures may hasten the popular judgment to decide that a man possesses them, but ultimately the learning of the lawyer decides the measure of his fame. Now, I pronounce that you are well fitted by nature and study, as well as practice, for such eminence, and by a practice that evinces your extensive learning and sound judgment as a lawyer, I cannot conceive that you will submit to an unfavorable test of character, or that you will be degraded from the place your friends wish to see you take.

“I will therefore assume it as a point proved, that by practice in great causes, and where law learning will be chiefly sought for, you will not impair the dignity of your standing by resorting to the bar. But you will reply, that by returning to open shop you cannot choose your customers, nor refuse to sell ordinary wares; to harangue a jury about the flogging given to a sailor, or to mingle in the snipsnap war about admitting a witness or a deposition, will often vex and humble the liberal mind; busi-

ness of small value will not lie in your way. I reply, your share will be made up by insurance cases, and questions which our bankrupt law is sowing for the harvest of 1804. I observe that the little contests and litigations are engrossed by the junior class of the profession and by those who never advance beyond mediocrity. This is, I think, a different position of things from what existed in 1786. You will not calculate on the small fees, nor the vexatious litigation which concern sixpenny interests and sixpenny passions. Mr. Parsons practises on this large scale that I recommend; and I will add, fees are infinitely better than they were in 1786.

"Who are the rivals for this business with whom you must divide the booty? Parsons stands first, but he is growing older, less industrious, and wealth, or the hypo, may stop his practice. Otis is eager in the chase of fame and wealth, and, with a great deal of eloquence, is really a good lawyer, and improving. He, however, sighs for political office—he knows not what; and he will file off the moment an opportunity offers.

"Dexter is very able, and will be an Ajax at the bar as long as he stays. You know, however, that his aversion to reading and to practice are avowed, and I believe sincere. His head aches on reading a few hours, and if he did not love money very well, he would not pursue the law. Sullivan, who seems immortal, is admonished of his decay by a fit every three months, and will not be in your way.

"I, your humble servant, never was qualified by nature or inclination for the bar, and this I always well knew. Want of health, and the possession of a small competence will stop my mouth, if fate should not stop my breath before your return. I have reckoned all the persons who pretend to be considerable. John Lowell's health is wretched. . . . A number of eminent lawyers will be wanted in Boston, and though the place is overstocked, I think the prospect for 1804 not unhopeful. I know of no very dashing young men coming forward.

"Yet truth requires that I should, after all, state my expectation, that your share of the business will not be as great as it would have been if you had not left the country. It takes time to form connections and to resume the old set of clients. You are no chicken, and ought not to calculate on a very long period of drudgery at the bar. You will, and you ought to, enjoy the *otium cum amicis et libris et dignitate*, for many years before you die. I will not conceal from you my opinion, that you ought not to expect, or to take into your plan, the receipt of a great many great bags of money from your practice. I do not found this moderate calculation on your want of merit and talent, or on the refusal of the public to admit your title to both; I only insist that, from circumstances connected with you, with rivals in practice, and with the state of business, you are not to look for a very large income.

"Suppose, however, instead of six, eight or ten thousand dollars a year, which Hamilton and some others are said to derive from practice, you get only fifteen hundred or two thousand dollars, ought you to decline practice on that account, or to feel mortified, as if the public had rejected and degraded you? I am interested to insist that this estimate of reputation is not fair, for I am not entitled to boast of a lucrative practice. The truth is, other considerations deserve weight, and the public will give it to them.

"To be engaged on great law points, and to acquit yourself as you will, surely cannot fail to vindicate you with every body. Your time of life, your reputation, property, and moderation as to the passion for gain, will be assigned as reasons, even before you can assign them yourself, for

your declining the toil of promiscuous business. It will be said, you would not be idle, nor will you be a drudge. This line of practice, the only one in your choice, will shelter you from the ungentlemanly wrangles of the bar, and the court have of late years set about learning some manners.

"Then the question is fairly before you, whether you will open your shop on such terms, and with such prospects as I have stated. Why not? I ask. You will, or some friends rather of yours will reply, why should Mr. Gore descend to this not very respectable, not very comfortable, not very lucrative fagging at the bar? I urge that it is better to keep up your style of living by some business, than to change it for an idle life, and a style observably lower than that you have been accustomed to. A man may make some retrenchments and savings, but he cannot greatly alter his expense without *descending*, which I should be sorry you should have forced upon you. A man may not incline to take a certain degree on the scale of genteel living, but having once taken it he must maintain it. Still I think that law in Boston will keep you out of the way of spending fifteen hundred or two thousand dollars, that a retirement of idle luxury would impose upon you at Waltham. Every southern visitor must see your improvements, show them to his wife, and eat and drink you ten guineas' worth. \$2000 saved, and \$2000 got is \$4000, enough to meet all the demands on your treasury, over and above the resources drawn from your property. Perhaps the superior cheapness of living in Boston may not strike you. I reply, a busy man may make savings and reputably, if he will; and indeed he must renounce business, or be moderate in his pleasures. He must often draw a special plea and refuse a feast. This is not all. Make the comparison between business and no business. Farming at Waltham will be some resource, but I have no idea that it will afford that steady occupation which is essential to keep life from being a heavy burden. Books, you will say, afford that resource. In some degree they do, but they need auxiliary resources. In case you should be at Waltham, unemployed by the public, you will be in some danger of being forgotten by the great multitude — out of sight out of mind, is their maxim. By practice you will be in sight, and ready, in every one's mind, for such public employment as your friends will say ought to seek you. Therefore the bar is in my judgment the best place for you to occupy, whether you aim at economy in expense, tranquil enjoyment of friends, or the resumption of any public station. Your social affections will find objects and exercise; you will be kept busy, and of course cheerful; you will not appear to be laid by or thrown away, but to have chosen your old post. Even if you should do little business, the extent of your sacrifice will be the more apparent. You will return, not with a raging thirst of gain, but with a resolution to study your cases and to merit confidence and reputation.

"Hence I conclude you ought to 'open shop' again. On conversing with Mr. Cabot, I confess he instantly decided the point against me; on further discussion he came over to my opinion. Indeed, it seems to me not merely the best course, but the only one left to you. All which is humbly submitted.

FISHER AMES, *Foreman*." — p. 299.

This letter, thus playfully framed and subscribed, affords us a fair specimen of Mr. Ames's epistolary style. It exhibits also, in a remarkable degree, that extraordinary good sense, which, applied to affairs of more general interest, is denominated wisdom; implying a grasp of mind and sound-

ness of judgment and a faculty of sagacious discrimination, which are the rarest of human gifts. With this no one can doubt Mr. Ames was eminently endowed. He has been sometimes styled "the Burke of America." Such comparisons often fail in some essential particulars; and in the present instance, we suppose would be understood as intimating some inferiority to his great prototype, on the part of the American statesman. In our opinion, not rashly formed, Mr. Ames, with a cast of mind and genius and a nervous organization, in some respects essentially similar to the characteristics of Mr. Burke, may well be held fully the equal of that great man, except on the score of general learning, for the acquisition and cultivation of which, this country afforded fewer opportunities and inducements than, at that time at least, existed abroad. He was, nevertheless, an elegant scholar, as we gather from the memoir, already adverted to; a fact, indeed, sufficiently apparent not merely from the classical allusions to be found in his speeches, letters and political essays; but from that ardor and glow and elevation of thought, which show clearly that his mind had been at those great sources of inspiration, whose draughts invigorate and ennoble minds of any kindred warmth. The grand essays of Mr. Burke, rich in all the resources of his luxuriant and subtle imagination, were in reality addressed to the higher mind of society; that is, to that audience of cultivated and educated people, whose minds were capable of becoming imbued with the spirit of his powerful and generous, but frequently abstract speculations; and whose influence upon the administration of public affairs might be, therefore, rather reflective than direct. The briefer pieces of Mr. Ames, employing, generally and from necessity, no higher vehicle of communication with the public, than the newspapers of the day, were far more practical concessions to such claims as the people themselves might be thought to have upon his instruction and advice. Yet they are dignified and enhanced by the weight of his learning, and glow with the illuminating fire of his genius. We should be disposed to indicate, as one chief point of difference, that Mr. Burke *thought*, while Mr. Ames both *thought and felt*. We do not mean to be understood that in our opinion the great British statesman, for whom we claim to entertain an unsurpassed admiration, was really deficient in true manly feeling; but that the emotions caught

from the imagination, in the closet, must be necessarily somewhat colder than the spontaneous and natural bursts of the heart.

In one important particular, our own countryman must bear away the palm. No man surpassed him in his faculty of engrossing the profound attention and regard of his audience, and few speeches have so thoroughly won the great object of immediate results, at once so triumphant and overwhelming, as his own. Indeed, the clear logical deductions, the soul of imagination, the depth of earnest feeling, the statesmanlike knowledge, the philosophical analysis, the force of reasoning, the power, aptness and elegance of expression, — all combined in his great speech on the British Treaty, delivered in the House of Representatives of the United States, April 28, 1796, — are so animated by the vigor, and, so to speak, elastic spring of the style, that we who read can have no hesitation as to its influence on those who heard it. It was of this speech that John Quincy Adams, — certainly no incompetent judge, — who had listened under very favorable circumstances, to all the distinguished orators of the British Parliament at its most brilliant period, — to Burke, and Pitt, and Sheridan, and Fox, — and who had heard and observed all that our own Congress could produce, when the great men of those times led on the contending parties, — pronounced — “There could be no doubt of it — of all that he had ever heard — Mr. Ames’s speech on the British Treaty was surely the most eloquent.”

The closing paragraphs of this noble appeal to the honor as well as the judgment and reason of the nation, which afford, however, a very inadequate idea of its general character, are exceedingly touching and beautiful. If it be literally true, as we have no question it was substantially so, that this speech was delivered without any of that mature antecedent reflection, and direct, careful preparation, with which most of the grandest efforts of the human mind have been wrought out, we should scarcely know where to look for its parallel.

“Let me cheer the mind, weary no doubt, and ready to despond on this prospect, by presenting another which it is yet in our power to realize. Is it possible for a real American to look at the prosperity of this country, without some desire for its continuance, without some respect for the measures which, many will say produced, and all will confess have preserved, it? Will he not feel some dread, that a change of system will reverse the scene? The well-grounded fears of our citizens, in 1794,

were removed by the treaty, but are not forgotten. Then they deemed war nearly inevitable, and would not this adjustment have been considered at that day as a happy escape from the calamity? The great interest and the general desire of our people was to enjoy the advantages of neutrality. This instrument, however misrepresented, affords America that inestimable security. The causes of our disputes are either cut up by the roots, or referred to a new negotiation, after the end of the European war. This was gaining every thing, because it confirmed our neutrality, by which our citizens are gaining every thing. This alone would justify the engagements of the government. For, when the fiery vapors of the war lowered in the skirts of our horizon, all our wishes were centred in this one, that we might escape the desolation of the storm. This treaty, like a rainbow on the edge of the cloud, marked to our eyes the space where it was raging, and afforded at the same time the sure prognostic of fair weather. If we reject it, the vivid colors will grow pale; it will be a baleful meteor portending tempest and war.

"Let us not hesitate, then, to agree to the appropriation to carry it into faithful execution. Thus we shall save the faith of our nation, secure its peace, and diffuse the spirit of confidence and enterprise that will augment its prosperity. The progress of wealth and improvement is wonderful, and some will think, too rapid. The field for exertion is fruitful and vast, and if peace and good government should be preserved, the acquisitions of our citizens are not so pleasing as the proofs of their industry, as the instruments of their future success. The rewards of exertion go to augment its power. Profit is every hour becoming capital. The vast crop of our neutrality is all seed wheat, and is sown again, to swell, almost beyond calculation, the future harvest of prosperity. In this progress what seems to be fiction is found to fall short of experience.

"I rose to speak under impressions that I would have resisted if I could. Those who see me will believe, that the reduced state of my health has unfitted me, almost equally, for much exertion of body or mind. Unprepared for debate by careful reflection in my retirement, or by long attention here, I thought the resolution I had taken, to sit silent, was imposed by necessity, and would cost me no effort to maintain. With a mind thus vacant of ideas, and sinking, as I really am, under a sense of weakness, I imagined the very desire of speaking was extinguished by the persuasion that I had nothing to say. Yet when I come to the moment of deciding the vote, I start back with dread from the edge of the pit into which we are plunging. In my view even the minutes I have spent in expostulation have their value, because they protract the crisis, and the short period in which alone we may resolve to escape it.

"I have thus been led by my feelings to speak more at length than I had intended. Yet I have perhaps as little personal interest in the event as any one here. There is, I believe, no member, who will not think his chance to be a witness of the consequences greater than mine. If, however, the vote should pass to reject, and a spirit should rise, as it will, with the public disorders, to make 'confusion worse confounded,' even I, slender and almost broken as my hold upon life is, may outlive the government and constitution of my country." — p. 69

Fisher Ames was born at Dedham, Massachusetts, April 9, 1758. There he continued to live, except as public duties required his presence at the seat of government. "His spotless youth," says Dr. Kirkland, "brought blessings to the whole remainder of his life." At his native

place he died July 4, 1808; a day fitly closing, though too early, the valuable life of a true patriot, in peace and honor. There was a great deal in his mind, manners, habits, and general character, which might well have commended his memory to the old Greek biographer. His last thoughts dwelt deeply upon his country, and upon a condition of public affairs, which he had employed his best talents and energies all his lifelong to avert. He regarded the doctrines, upon which the national administration was then conducted, with a feeling akin to horror. The same venerable friend whom we have before mentioned, visited him, in company with Mr. Cabot, about ten days before his departure. He was then in bed. The conversation fell upon the disheartening aspect of the times and the dangers threatening the public safety, from the discordant elements then at work. "The Union must be preserved," said Mr. Ames; "things are bad enough; but any thing is better than dissolution."

Recent American Decisions.

Circuit Court of the United States, for the District of Massachusetts, October Term, 1854.

EX PARTE MICHAEL CREGG.

Naturalization — Primary Declaration, where to be made.

A Court of Record, without any clerk or prothonotary, or other recording officer, distinct from the judge of such court, is not competent, under the act of April 14, 1802, (2 Stat. at Large, 153), to receive an alien's preliminary declaration of his intention to become naturalized.

THE facts in this case sufficiently appear from the opinion of the court, by

CURTIS, J. This is an application by Michael Cregg, an alien, to be naturalized. To show a compliance with the requirement of the act of Congress to make a previous declaration of intention to become naturalized, he produces a paper which purports to be a copy of a declaration made by him in the Police Court of the city of Lynn, in the State of Massa-

chusetts. It is admitted by the petitioner that T. B. Newell, Esq., who signed this paper as Clerk, was also the Judge of that Police Court, and that there was no other judge or clerk thereof at the time when the petitioner's declaration was made. The question is, whether the Police Court of Lynn was competent in point of law to receive this declaration.

This question depends on the act of Congress of April 14, 1802, (2 Stat. at Large, 153), which prescribes the conditions upon which aliens may be admitted to be citizens of the United States. The first of those conditions allows the preliminary declaration to be made on oath or affirmation, before the Supreme, Superior, District, or Circuit Court of some one of the States. And the third section of the act is as follows: "And whereas doubts have arisen whether certain Courts of Record in some of the States are included within the description of District or Circuit Courts; be it further enacted, that any Court of Record in any individual State having common law jurisdiction, and a seal and clerk or prothonotary, shall be considered as a District Court within the meaning of this act."

In *Ex parte Gladhill*, 8 Met. 168, the Supreme Court of Massachusetts decided that the Police Court of Lowell was a Court of Record having common law jurisdiction. The Police Court of Lynn, which was established by statute, 1849, c. 86, is so far identical with the Police Court of Lowell in respect to its presiding justice, the mode of his appointment, the tenure of his office, the jurisdiction of the court and the record of its proceedings, that we are satisfied that that decision applies to those particulars in this case, and we see no sound reason to doubt that the Police Court of Lynn was a Court of Record, having a common law jurisdiction. But two questions still remain, — whether that court had a clerk and a seal. In the act for organizing the court, (sec. 7,) the justice is directed to keep a fair record of all proceedings therein. In the case of *Ex parte Gladhill*, the Chief Justice says: "It might be argued that the act of Congress intended to limit the power to a court having a separate recording officer, whose act should authenticate its doings, and that the signature of a separate recording officer might add something to the credit due to an authenticated transcript. On the other hand, it might be urged with some plausibility, that if the judge is specially vested by law with the clerical authority, the court has a clerk

within the letter and equity of the statute." This question that court had not occasion to decide; and did not attempt to decide; because by another act, (St. 1838, c. 147, s. 2,) the Police Court of Lowell was authorized to appoint, and had in fact appointed a clerk before the declaration then in question was made. We are of opinion the Police Court of Lynn, in which the justice was the recording officer, was not a court having a clerk within the meaning of the act of Congress. Certainly, it does not come within the terms of that act, which clearly imply that there may be Courts of Record having a seal and common law jurisdiction, but no clerk or prothonotary, and that such courts are not included by the act. Yet how could this be if it were enough that the presiding justice should himself record the proceedings? A Court of Record necessarily requires some duly authorized person to record the proceedings. When the act speaks of Courts of Record, it speaks of courts whose proceedings are duly recorded by authorized persons; and when it says "having a clerk or prothonotary," it superadds the requirement that those proceedings shall be recorded by one of those officers. Unless the act be so construed, the requirement of a clerk or prothonotary would have no meaning. The act would have the same construction as if it were stricken out, because the words, Court of Record, would carry with them the necessity of having the proceedings recorded by some one by authority of law. Nor do we consider it a vain and useless precaution, to confine the power to naturalize aliens to courts in which one of those officers is found.

In *Spratt v. Spratt*, 4 Peters, 393, it was declared by the Supreme Court that the various acts on the subject of naturalization submit the right of aliens to Courts of Record. They are to receive testimony, to compare it with the law, and to judge on both law and fact. If their judgment is entered on record in legal form, it closes all inquiry, and, like any other judgment, is complete evidence of its own validity.

The importance and value of this privilege of citizenship, which is conclusively and finally bestowed by the act of the court having jurisdiction, should prevent us from allowing less than its full weight to any requirement by Congress which tends to restrict this power to those tribunals which may be supposed most competent to exercise it. And cer-

tainly, there would seem to be no propriety in intrusting to a court, which, in the exercise of its common law jurisdiction, cannot pass finally on any matter of law or fact, affecting property to the amount of one dollar, to make a final decision upon all questions of law or fact involved in an application for this great right, so as to make an absolute and unimpeachable grant of it.

Now it is generally true, that a Court of Record, which is without a clerk or prothonotary, is not only a subordinate tribunal, but one to which a very narrow and comparatively unimportant jurisdiction is intrusted.

It is also true that there is more security that its proceedings will be correctly recorded and certified, if it has such an officer charged with those particular duties.

Congress might well have had both these things in view, when it required the court to have such an officer. And we are of opinion that a court not having such an officer, does not possess the authority conferred by the act.

As to the other question, respecting the seal, we do not find it necessary to determine it. The transcript produced says it is under the seal of the court, but the paper bears no seal. Whether the court has, in point of fact, adopted a seal, we do not know. Whether if it has done so, it can be deemed a court having a seal, that is, a general seal, forming one of the legal means of authenticating its proceedings, within the meaning of this act of Congress, we give no opinion.

The District Judge concurs in this decision, and the application for naturalization must be denied.

Argued *ex parte* by *B. S. Treanor*, for the petitioner.

*Circuit Court of the United States for the District of
Massachusetts, October Term, 1854.*

JOSHUA C. MAYO ET AL. v. JESSE SNOW ET AL.

*Fishing Voyage — "Small Generals" Responsibility of Master and
Owners — Tender.*

Where a master of a fishing vessel agreed with the managing owner to take her for the season and go to the "Banks" cod-fishing, the owners to have one quarter of the fish and oil, and three eighths of the bounty; the residue to belong to himself and his crew, and to be applied first to pay the bills, and then any balance remaining to be divisible among the master and crew; the master to have the vessel fitted where he pleased, and have the fish cured by whom he should choose; and the master

hired the crew and purchased the provisions and supplies for the voyage. It was *held*, that, on these facts, he was owner *pro hac vice*, and that he, and not the general owners, were responsible for the "small generals." The Stat. of 1813, (3 Stat. at Large, p. 2, § 1,) furnishes no ground for a distinction in this respect between cod-fishing and other voyages. Although the master is owner for the voyage, the general owners may, nevertheless, be liable for supplies, upon the ground of an agency for the owners to procure them, arising out of the particular terms on which he hires the vessel. And here the owners were liable for certain articles, because, by the contract of letting to the master, they were to procure and pay for such articles before the beginning of the voyage; and they having authorized him to buy them, it was considered that they made him their agent therefor, not because he was master, but by virtue of the particular authority so given.

CURTIS, J. — This is a suit in the Admiralty, against the owners of the fishing schooner *Lydia & Polly*, to recover the price of supplies furnished to that vessel by the libellants. The supplies were of three kinds: first, ship-chandlery; second, that class of articles commonly called in the fishing business, "great generals;" third, what are denominated in that business "small generals."

For the amount of the first two, the respondents made a tender before suit, which they pleaded in their answer, and the District Court found it to be sufficient. In that respect, with the exception of one item, the decree of that court has not been seriously contested, and I see no reason to disturb it.¹

Upon the question of the liability of the respondents for the "small generals," it is necessary to ascertain their relation and that of the master to the vessel, when the supplies were procured. The libellants have produced the testimony of the master, and he is the sole witness in the cause. He testifies, that about the last of February, 1853, he agreed with the managing owner of the vessel, to take her for the season and go to the "Banks" cod-fishing; that the owners were to have one quarter of the fish and oil, and three eighths of the bounty; the residue was to belong to himself and his crew, and to be applied first to pay the bills, and then any balance remaining would be divisi-

¹ The liability of the respondents for the "great generals" and the ship-chandlery bill was not contested by them here or in the court below; and they had offered to pay for the same before, and in their answer; and we are informed that the District Court, SPRAGUE, J., on the question of tender, *held*, that an offer to pay made in good faith, with undisputed ability and readiness to perform, renewed in the answer in court, was a good and sufficient tender in the Admiralty, although originally accompanied with a request for a receipt, and although the money was not subsequently brought into court.

ble among himself and the crew : that he was to have this vessel fitted where he pleased, and have the fish cured by whom he should choose ; that he hired the crew, and purchased the provisions and supplies for the voyage.

Upon these facts, it is clear the master was owner *pro hac vice*, and he, and not the general owners, was responsible for the "small generals." *Webb et al. v. Pierce et al.*, 1 Curtis, 104. The libellants, however, insist, that though this may be the law generally, it is not applicable to vessels engaged in the cod-fishery under the acts of Congress, or that if it is, the special facts of this case take it out of that general rule. It is certainly true, that though a master be owner for the voyage, the general owners may nevertheless be liable for supplies, upon the ground of an agency for the owners to procure them, arising out of the particular terms on which he hires the vessel. This case affords an illustration. For what is called the ship-chandlery bill, the owners are liable in this case ; because, by the contract of letting to the master, the owners were to procure and pay for these articles before the beginning of the voyage, and when they authorized the master to buy them, they thereby made him their agent for that purpose ; not because he was master, but by force of the particular authority thus given to him. But, aside from such an authority, I do not find any distinction, as to ownership *pro hac vice* and its consequences, between fishing and other voyages, and none appears to have been made in any case which I have seen. I have been referred to the case of *Harding v. Souther et al.*, decided by the Supreme Court of Massachusetts in 1853, and not yet reported, in which it was held that the general owners of a vessel engaged in the mackerel fishery, were liable for the wages of the cook. But I understand, that decision rests upon the principle above indicated ; that, without regard to who was owner for the voyage, the usages of the business included authority to the master to hire a cook on account of, and to be paid by, the general owners. It was suggested that the language of the act of 1813, c. 2, § 1, (3 Stat. at Large, p. 2,) implies that the owners have the control of the crew. But the word owner, occurring in connection with the discharge of the crew, may well mean owners *pro hac vice*. And if it be taken to mean the general owners, it does not prove that Congress intended to prohibit such a letting of the vessel to the master, as would make him the temporary owner as to third

persons furnishing supplies. This is a subject which does not seem to have been at all within the view of Congress; and I think it would not be safe or warranted to declare it was intended to make a distinction between fishing and other vessels in this particular. In *Winsor v. Cutts*, 7 Greenl. 261, and *Houston v. Darling*, 4 Shep. 413, the Supreme Court of Maine has applied to the owners of fishing vessels, the same rule of law as is applied to the owners of other vessels, and I consider it correct to do so. Nor do I find any thing in the circumstances of this particular case to take it out of the general rule. There are some loose statements by the master, mostly made in answer to very leading interrogatories, concerning his having received directions from the managing owners as to hiring men and furnishing supplies. But I am satisfied, by a careful consideration of his evidence and of the surrounding circumstances, that what was said was advisory, merely, and was not intended and ought not to be taken to change the substantial relation of the parties, or to confer on the master an authority to purchase the "small generals" supplies on the general owners' account. As to the item for money borrowed, the master had no authority to borrow money as the agent of the owners; and if he, in fact, applied some of it to pay for articles which he purchased for the owners, he also had credit for what he thus paid in his account with the owners. He must be taken to have borrowed it on his own account, and applied a part, as his own money, to the owners' use.

Decree affirmed, with costs for the respondent.

William Brigham, for the libellants; *H. A. Scudder*, for the respondent.

*District Court of the United States for the Southern
District of New York.*

THE WASHINGTON.

*Revenue Laws—Demurrer to Libel—Forfeiture of Vessel for Smuggling
—Necessity of Prior Seizure.*

To authorize any District Court of the United States to adjudicate upon a cause of forfeiture of a ship, such ship must be within the jurisdictional limits of the court which is called upon to act, and subject to, and within the reach and under the control of, the process of such court. And such ship must be taken possession of, or seized by the process of the court. And to give such court jurisdiction to adjudicate upon the cause of forfeiture, the first seizure or taking, posses-

sion, by some one having legal authority, must be made within the limits of the district in which the court is established, before such court can adjudicate upon such cause of forfeiture, unless the first seizure is made upon the high seas, in which case the ship must be brought within such limits.

By seizure, in the 9th section of the act of Congress, of 1799, (1 Stat. at Large, 76) is meant any taking possession of the thing forfeited by virtue of a warrant, or other legal authority, for the purpose of enabling the proper court to inquire into, and to adjudicate upon, the cause of forfeiture.

It is necessary that there should be a seizure before the court can adjudicate upon the cause of forfeiture. And a seizure by the marshal, upon a warrant issued by the court, is sufficient to enable the court so to adjudicate, unless there has been a prior legal seizure in some other district, or a seizure on the high seas, and the property brought into some other district. A seizure by a custom-house officer is not an essential prerequisite to give the court authority judicially to inquire into the cause of forfeiture. A seizure by the marshal, under his warrant of seizure, is sufficient.¹

Where some of the counts in a libel for a forfeiture under the 50th section of the act of 1799, (1 Stat. at Large, 665,) alleged the value of the goods unladen to be less than four hundred dollars, such counts were held insufficient.

THE facts of the case sufficiently appear from the opinion of the court by

INGERSOLL, J.—This libel is filed to enforce a forfeiture claimed to have been incurred by the steamship Washington, by a violation of the fiftieth section of the act of Congress regulating the collection of duties on imports and tonnage, approved the 2d of March, 1799. Upon the filing of the libel a warrant of seizure issued, directed to the marshal, by virtue of which he, within the limits of his district, attached the ship, and the same is now holden to respond to the charges in the libel set forth.

There are two exceptions taken to the libel; one going to the whole of it, and the other going to particular portions of it. In one it is claimed that the libel is wholly insufficient, and that the court has no jurisdiction of the same, in the other that certain counts in the libel contained are insufficient, and show no cause of forfeiture of the ship. I will consider these exceptions in the order above set forth.

By the fiftieth section of the act of Congress of the 2d of March, 1799, (1 Stat. at Large, 665,) upon which the libel is founded, it is provided that no goods brought in any ship from a foreign port shall be unladen without a permit from the collector and naval officer; and if any such goods shall be so unladen, they shall be forfeited, and

¹ *Sed vide The Silver Spring*, Law Rep. for Sept. 1854, p. 264.

may be seized by any of the officers of the customs. And when the value thereof, according to the highest market price of the same at the port or district where landed, shall amount to \$400, the vessel, her tackle, apparel and furniture, shall be subject to like forfeiture and seizure. By the 9th section of the Judiciary act of 1799, (1 Stat. at Large, 76,) it is provided that the District Courts of the United States shall have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of imports, navigation, or trade, of the United States, where the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burden, within their respective districts, as well as upon the high seas.

In the libel it is represented to the court that the steamship Washington, at the city of New York, within the Southern District of New York, on waters navigable from the sea by vessels of ten or more tons burden, and within the jurisdiction of this court, in consequence of certain acts therein set forth, and committed at the port of New York, had become forfeited to the United States. And the prayer of the libel is, in substance, that she may, in such Southern District of New York, be seized by virtue of a warrant in the libel prayed for, in order that it may by the court be judicially determined whether such forfeiture has been incurred. There is no allegation in the libel that the ship had been seized by any custom-house officer, or by any other person invested with legal authority. The prayer, in substance, is, that she may be seized by virtue of a warrant issued by the court, and held to answer the charges in the libel contained. And, in pursuance of that prayer, a warrant of seizure was issued by the court, directed to the marshal, by virtue of which he (the marshal), within the limits of his district, took the possession and custody of the ship.

The exception taken is, that, prior to the filing of the libel, the ship had not been seized by any one having legal authority to seize; that prior to that time she had not been taken possession of by any one having legal authority to take possession of her; that although sufficient facts are set forth in the libel to cause a forfeiture of the ship, that forfeiture cannot be enforced, for the reason that, for that forfeiture, the ship, prior to the filing of the libel, had not been seized by any custom-house officer; that unless

there was such a seizure, or taking possession of the ship, prior to the filing of the libel, by some one having legal authority, the court has no legal power to act, either in granting a warrant to seize, or in adjudicating upon the question of forfeiture after such warrant of seizure shall have been issued and served; that a seizure under such process, when there has been no prior seizure without process, is void, conferring no right; and giving the court, which issues the process, and under and by virtue of which the seizure or taking possession is had, no power to judicially investigate the cause of forfeiture in the libel set forth.

It is very clear, that where a sufficient cause of forfeiture exists against a ship, that cause of forfeiture cannot be judicially investigated and adjudicated upon by every District Court in the United States. To authorize any District Court to adjudicate upon such cause of forfeiture, such ship must be within the jurisdictional limits of the court which is called upon to act, and subject to and within the reach and under the control of the process of such court; and such ship must be taken possession of or seized by the process of the court. And to give such court jurisdiction to adjudicate upon the cause of forfeiture, the first seizure or taking possession, by some one having legal authority, must be made within the limits of the district in which the court is established, before such court can adjudicate upon such cause of forfeiture, unless the first seizure is made upon the high seas, in which case the ship must be brought within such limits. The decisions upon this question are full and satisfactory. *The Abby*, 1 Mason, 360; *Keene v. United States*, 5 Cranch, 304; *Brig Little Ann*, Paine, C. C. R. 40; *The Octavia*, 1 Gall. 488.

It being thus established, where the seizure or taking possession of the ship by legal authority is not upon the high seas, there must be a seizure or taking possession by legal authority, and a right to make such seizure within the jurisdictional limits of the court, before the court can adjudicate upon the cause of forfeiture, and that that seizure must be the first seizure; the question is presented, What is a sufficient seizure of the ship to enable the court to inquire into and adjudicate upon the question of forfeiture? When a custom-house officer seizes under the power given him by the 50th section of the act of 1799, he only does it for the purpose of holding the property seized until

it can be taken possession of by the marshal, by virtue of the warrant of seizure which issues upon the filing of the libel. When the marshal seizes by virtue of the warrant which issues, then the possession of the custom-house officer is divested, and the marshal takes possession by virtue of his warrant of seizure. *Ex parte Jesse Hoyt*, 13 Peters, 279. If, as has been contended by the respondents, the right of the court to adjudicate is dependent upon a prior act of seizure by a custom-house officer, then if, for any cause, Congress should take away the right of a custom-house officer to seize, which he now has by virtue of the 50th section of the act of 1799, so that the section above referred to should provide only that the ship for the causes in such section mentioned, should be forfeited to the United States, it would follow, in such an event, that no proceedings could be had before any court to enforce such forfeiture. By seizure, in the 9th section of the act of Congress, of 1799, mentioned, is meant any taking possession of the thing forfeited by virtue of a warrant, or other legal authority, for the purpose of enabling the proper court to inquire into and to adjudicate upon the cause of forfeiture. By the court's ordering a warrant of seizure to issue, it does not adjudicate upon the question of forfeiture. By so doing, it only takes a step to enable it so to adjudicate.

The Supreme Court of the United States, in the case of *Ex parte Jesse Hoyt*, 13 Peters, 279, speaks of the act of the marshal in taking possession of the property libelled, under and by virtue of the warrant of attachment, as a seizure of the property: "As soon as the marshal seizes the same goods, under the proper process of his court," &c. And Judge Livingston, in the case of the *Little Ann*, Paine, C. C. R. 40, remarks, "That (in that case) it is not necessary to inquire whether a libel may not in some cases be filed, without a previous seizure, because a seizure is here stated, which it is admitted was not within this district nor on the high seas;" thereby strongly intimating that it could. The only object of a seizure by a custom-house officer is, that the property may be taken possession of, or seized by the marshal, under and by virtue of the process issued by the court. It is necessary that there should be a seizure before the court can adjudicate upon the cause of forfeiture. And a seizure by the marshal, upon a warrant issued by the court, is sufficient to enable

the court so to adjudicate, unless there has been a prior legal seizure in some other district, or a seizure on the high seas, and the property brought into some other district. A seizure by a custom-house officer is not an essential prerequisite, to give the court authority judicially to inquire into the cause of forfeiture. A seizure by the marshal under his warrant of seizure is sufficient. I come to this conclusion the more readily, as it seems to have been a common practice among the district attorneys for this district to frame libels for forfeitures, without alleging any prior seizure by a custom-house officer.

The other exception is to the sufficiency of certain counts in the libel contained. By the fiftieth section of the act of 1799, the ship is not forfeited, unless the goods unladen without a permit are of the value of four hundred dollars. In some of the counts of the libel the value of the goods unladen is said to be of a less value than four hundred dollars. Such counts of the libel therefore, as allege the value of the goods unladen to be less than four hundred dollars, must be adjudged to be insufficient. The exception as to such counts is well taken.

The judgment of the court, therefore, is, that the court has jurisdiction of the case; that the libel is sufficient, except those counts thereof in which it is alleged that the value of the goods unladen was less than four hundred dollars, and that such counts be adjudged to be insufficient.

For the United States, Mr. *Joachimson*; for the claimants, Messrs. *Owen, Betts and Vose*.

Supreme Judicial Court of Maine, Oxford, ss., 1854.

**GEORGE CHAPMAN v. THE ATLANTIC AND ST. LAWRENCE
RAILROAD COMPANY.**

Liability of Railroad Corporations for Property consumed by Fire, communicated from their Locomotive Engines—At Common Law and by Statute.

In Maine, the liability of railroad corporations for property consumed by fire, communicated from their locomotive engines, under the statute of that State relating to this subject, (Laws of 1842, c. 9, § 5,¹) extends only to property permanently existing along their routes, and capable of being insured. As to movable property, having no permanent location, the liability of such corporations is to be determined by the principles of the common law.

¹ See Stat. 1840, c. 85, section 1, (Mass.)

By those principles, persons in the legitimate pursuit of a lawful business, or in the performance of acts authorized by law, are only liable for such injuries, resulting therefrom to others, as are occasioned by negligence, misconduct, or carelessness; and independent of special statute provisions, such only would be the liability of railroad corporations.

THIS was an action of the case, in which the plaintiff claimed damage for the loss of about nine hundred cedar posts, deposited on his own land, on the line of the defendants' railroad track, in the town of Bethel, and consumed by fire communicated from a locomotive engine of the defendant corporation.

The case was tried at the November term of the Supreme Court in Oxford, in 1853, Judge WELLS presiding. Messrs. *May* and *Frye*, for the plaintiff; and *James O'Donnell*, for the defendants.

The defendants contended: —

1. That, in order to entitle the plaintiff to recover, he must prove negligence or unskillfulness on the part of the corporation, or want of ordinary care in the management of their engine, at the time of the accident.

2. That the statute upon which the action is founded, was not intended to refer to any property except permanent erections, or property deposited with a knowledge of the company's agents for a specified length of time, to enable them to insure against loss by fire.

3. That the company could not be held liable for the loss of personal property, temporarily placed in a hazardous position by the owner, without their knowledge, and liable to be removed by him, *ad libitum*.

4. That if the jury found that the property in question was voluntarily placed in dangerous proximity to the track of the railroad by the plaintiff, it manifested a want of ordinary care on his part, and he was not entitled to any remedy for his loss.

The judge overruled these, and several other points of defence, considering the defendants liable at all events, provided the plaintiff's loss was occasioned in the manner alleged in the writ. The jury found a general verdict for the plaintiff; whereupon the defendants' counsel excepted to the rulings of the court, reserving the points above stated.

RICE, J. — This action is founded upon the fifth section of the ninth chapter of the Laws of 1842, which is as follows:

“When any injury is done to a building, or other property, of any person or corporation, by fire communicated

from a locomotive engine of any railroad corporation, the said corporation shall be held responsible in damages to the person or corporation so injured; and any railroad corporation shall have an insurable interest in the property for which it may be so held responsible in damages along its route, and may procure insurance thereon in its own behalf."

The language in the first part of this section is very broad and general in its terms, and if applied without qualification or restriction, will include injuries to every species of property by fire communicated by a railroad locomotive engine.

No case has heretofore been presented for adjudication in this State under this section of the statute. In Massachusetts, under a statute of which the section above quoted is an exact transcript, it has been held that a railroad corporation is liable for injuries occasioned to buildings situated along the route of its road, by fire communicated directly or indirectly by its locomotive. *Hart et al. v. The Western Railroad Corporation*, 13 Met. 99. It is contended by the defendants in this case, that the liability imposed by the statute extends only to personal property or erections made on the land, but does not apply to wood or movable property.

In determining the true construction of a statute, all its provisions should be taken into consideration, in order to ascertain the true object and intention of the Legislature.

For this purpose, the latter clause of the section referred to is of much importance, as it may serve to explain, and, to some extent, to qualify the first clause of the same section.

By the principles of the common law, persons in the legitimate pursuit of a lawful business, or in the performance of acts authorized by law, are only liable for such injuries resulting therefrom to others, as are occasioned by negligence, misconduct, or carelessness, and independent of special statute provisions, such only would be the liability of railroad corporations. By the terms of their charter they are authorized to use locomotives propelled by steam. If it be said that owners of property along the route of such roads are subjected to greater hazard from the use of locomotives than from other agents used for propelling vehicles for transportation of passengers and merchandise, it may be answered, that an equivalent com-

pensation is supposed to have been rendered, in the form of damages, when the road was originally located — that, in estimating such damages, the purpose for which the land taken was to be used, and the manner of its use, were as well to be considered as the amount of land actually taken.

The statute does, however, impose additional liabilities upon corporations using this kind of motive power. But while it thus, probably for the purpose of insuring extraordinary care, imposes these additional liabilities upon railroad corporations, it also authorizes them to protect themselves from loss, by insuring that property along their route from injury to which, by fire, they are made responsible. Their right to insure is coextensive with their liability, in case of loss. To make this right to insure property of any practical value to the corporation, the property must be of such a character, and so situated, as to render insurance practicable by the use of reasonable diligence. The locomotive is confined to the track of the road, and cannot be diverted from its course to avoid combustible materials which may be deposited along its route. To hold that the liability extends to those articles of movable property, which have no established location, but may be deposited and removed with such facility as to render insurance impracticable and unavailing, would be unreasonable, as it would extend the liabilities of those corporations far beyond the means afforded for their protection. This manifestly is not the intention of the statute.

In the case already cited from Metcalf's Reports, the court, in speaking of this clause of the statute, say: "These latter words, we think, describe buildings being near and adjacent to the route of the railroad, so as to be exposed to the danger of fire from engines, but without limiting or defining their distance." Again, in the same case, the court remark: "The effect of the statute is to diminish the specific risk to which such buildings may be exposed," &c. These citations are not made as direct authority in this case, because the point now under consideration was not then distinctly before the court; but as tending to elucidate the construction we now give the statute.

In view of these considerations, the conclusion to which we have arrived is, that the liability of railroad corporations, under this statute, extends only to property permanently existing along their routes, and capable of being

insured; and that as to movable property, having no permanent location, the liability of such corporation is to be determined by the principles of the common law. The second requested instruction should therefore have been given. It is not deemed necessary to discuss the other points raised in the case.

Exceptions sustained, verdict set aside, and a new trial granted.

Supreme Court of Vermont, Chittenden, ss., December Term, 1853.

BEACH v. BOYNTON.

Fraudulent Conveyance — Right of Surety for Grantor to Penalty under the Statute of Vermont.

A surety for the grantor, in a fraudulent conveyance, is to be regarded as the party aggrieved by such conveyance, from the date of his suretyship, and before he pays any portion of the debt, and his right to recover the penalty given to the party aggrieved is perfected, by paying the debt, and dates from the time of his becoming surety.

REDFIELD, C. J. — The only question made in the present case is, whether the plaintiff is so related to the parties to the alleged fraudulent conveyance, as to be entitled to sue for the penalty. The plaintiff was at the time of the conveyance a surety merely, having never paid any portion of the debt, which he subsequently did pay, and had an allowance against the estate of the grantor in the conveyance. The question then is, Whether the plaintiff can be considered the party aggrieved, within the meaning of the statute?

It is certain that, for many purposes, the plaintiff was not a creditor, at the date of the conveyance. It is not claimed, nor is it necessary perhaps to show, that he was a creditor, in every sense, and to every purpose. He could not sue the principal, but in equity he might take proceedings, after the debt becomes due, to compel the creditor to assign the debt to him, on payment of the amount due, and thus enable himself to take the property of the debtor.

And it is not seriously urged, that he could not avoid the conveyance made by the debtor, after he became surety, and before he assumed the debt. It would be strange if this were not so. For it is admitted, as it must be, that he was a creditor after assuming the debt. But it

is urged, that he is to be treated as a creditor subsequent to the conveyance, and only from the date of the actual assumption of the debt. Now it is very obvious that his rights, and the duty owing to him, are altogether of the nature of a prior creditor.

1. The prior creditor is allowed to avoid the conveyances because it deprives him of property, to which he does look, or has the right to look, for his indemnity. 2. The prior creditor may avoid a subsequent fraudulent conveyance, because it is supposed to deprive him of a means of indemnity, which may be presumed to have formed the consideration of his undertaking. 3. The subsequent creditor cannot avoid the conveyance, chiefly because he is not deprived, either of the consideration of his undertaking, or of his indemnity.

Now, in both these respects, the surety is more within the requisites of a prior creditor, than even the primary creditor was, who may be supposed, as is commonly the fact, to look more to the surety for his indemnity, than to the property of the primary debtor. And under these circumstances, if these debts were the only ones owing, (and they may fairly be viewed in that light, for the present purpose,) the surety is, in equity, and within the evil intended to be remedied, by the statute, far more obviously than the principal creditor, the party aggrieved. He is, if responsible, the only party aggrieved in the general and popular sense. And the grantor, in a case like that supposed, must be understood to have intended the necessary result of his conduct, *i. e.*, to defraud the plaintiff, by depriving him of all redress or indemnity for his undertaking.

But I should consider, that the plaintiff, to prevail, must not only show himself within the equity of the statute, and the evil intended to be remedied, but also within the fair import of the words of the statute, construed with reference to their subject-matter.

This statute must undoubtedly be regarded as a penal statute, so far as the present action is concerned, for any recovery had will be strictly a penalty. But as the statute is expressed, it seems to me impossible to say, that one who may avoid the conveyance under the twenty-third section, is not the party aggrieved under the twenty-fourth section. For the twenty-fourth section refers in express terms to the twenty-third section, for the definition of the party aggrieved. The party aggrieved must be the party,

and all the parties, whose right, debt or duty is attempted to be avoided.

And when it is said the plaintiff may avoid this conveyance possibly, but that he comes in to do so, under the common law, and not under the statute, I must say, that I do not feel any sound basis for such an argument to rest upon. If a statute exists upon the subject, it must be concluded that it was intended to supersede the common law, and to govern future cases. That being so, a case not within the statute might fairly be presumed to have been purposely omitted, and if so, virtually excluded from the benefit of the statute, and by consequence, of the common law, in regard to avoiding the conveyance, even by levying upon the property. And especially should this be so regarded, in a case coming closely within the range of the statute. Now the statute may fairly be considered as intending to embrace all rights, coming under the general denomination of contracts. The word "debt" is undoubtedly the controlling word in defining the party aggrieved. But very obviously the words "right and duty" are intended to extend the definition beyond the strict import of the word "debt," else they would scarcely have been used. That statute was drawn up, and has passed through the hands of men who may fairly be presumed not to multiply words for mere euphony; some purpose was doubtless intended to be served by them. But right and duty are no doubt limited to such rights and duties as are of the nature of debts, such as exist *ex contractu*. But even with that limitation, (and no other occurs to me, as coming fairly within the probable purport of the statute,) they are far more extensive in their signification than debt in its strict sense.

And although no right existed on the part of the plaintiff, or any duty on the part of Boynton, which could form the basis of an action at the time of the conveyance, yet that is not indispensable. If it were, the right or duty must not only exist, but be perfect, and *due* presently. It may doubtless be, not only *due*, *in futuro*, which no one denies, but it may be contingent, to some extent, like a covenant against incumbrances, or for quiet enjoyment, which could scarcely be said to import no duty, on the one part, or right on the other, and are clearly of the nature of a debt, so far as to be matters of contract, and are still as really contingent, as that of the right of a surety to

indemnification. And if the surety had taken a bond of indemnity, no one could question his claim would be strictly analogous to that of the covenants of warranty in a deed. And still, I think, it would scarcely be claimed, that, in that case, the surety might be regarded as the party aggrieved by the conveyance, and not in a case like the present. Such a difference, in result, could scarcely be predicated upon a difference as to the form of the undertaking. There is as really a right to be indemnified on the part of the surety, and a duty on the part of the principal to indemnify, as if it were in the form of a bond. And it has been held, that if the surety has been really damnified, before he brings suit, and subsequently pays a part of the debt, or the whole, while the suit is pending, such payment, subsequent to the bringing of the suit, may be recovered in the action. The truth is, that in popular language, and within the evil intended to be remedied by this statute, the surety has a right and the principal owes him a duty, which is of the nature of a debt, to save him harmless. And if necessary, for any purpose, to show the date of his claim, he may declare upon this implied duty, or promise to save harmless, which is certainly recognized in the elementary writers upon this subject, and in most of the cases which speak upon this part of the subject. Ch. J. Mellen fully indorses this view in *Howe v. Ward*, 4 Greenl. 195; and that case seems fully in point to govern the present in all its facts. And the cases of *Carlisle v. Rich*, 8 N. H. 44, and the case of *Thompson v. Thompson*, 19 Maine, 244, being bonds for official faithfulness, and the conveyance before any fixed liability of the sureties, seem in principle to control the present, and the courts, in both these cases, very fully recognize a surety as the creditor of his principal, from the date of his suretyship. So also does the case of *Sargent v. Salmond*, 27 Maine, 539. And so does *Jackson v. Seward*, 5 Cow. 67, and the reversal of the case does not touch this question. The assertion of the court in *Brooks v. Clayes et al.*, 10 Verm. 37, that a party might set aside the contract, in many cases, where he could not recover the penalty, is no doubt true in many respects. But that, as our statute is expressed, both subjects being combined, by express reference, it can be true, that in a case of clear proof, one may be so situated, as to be entitled to avoid the conveyance, and not sue for the penalty, I do not comprehend.

The twenty-third section of our statute says, that "Every the party, whose right, debt, or duty is attempted to be avoided, may avoid the conveyance," and the twenty-fourth section, that "All the parties to such fraudulent and deceitful conveyance, &c. shall forfeit and pay a penalty," &c., which forfeiture shall be equally divided between the party aggrieved, *i. e.*, whose right, debt, or duty is attempted to be avoided, referring *in totidem verbis*, to the definition of the person who may avoid the contract, thus making them identical, so far as language can do it. So that to say, in this case, that the plaintiff is entitled, under the statute, to avoid the conveyance, and not to sue for the penalty, is a mere arbitrary evasion of the manifest import of the statute.

Bankrupt cases prove nothing either way. Sureties were formerly not allowed to prove their claim as creditors, either in this country or in England. But in the late bankrupt law of the United States sureties were allowed to prove, and were, of course, bound by the bankrupt's discharge; as was held in the case carried up to the United States Supreme Court, from the decision of this Court, *Wells v. Mace*, 17 Verm. 503, which was reversed upon that ground alone. And the late English bankrupt laws are the same. And so against insolvent estates, sureties may now present their claims. But these remote analogies prove but little either way. There are, no doubt, some difficulties in the way of treating the plaintiff, as the party aggrieved, from the date of his suretyship, but far more in denying it. If we deny it, we must also deny his right to avoid the conveyance, to be consistent. In allowing it, we meet the obvious intent of the statute, in both respects, and certainly do no violence to its words; while, in the other case, we defeat both the sense and the words, and the obvious design of the statute.

The first impression of the question in this case is very striking — that to deny a surety the right to come in as a creditor from the date of his suretyship, is a manifest perversion of his true position; and the more I have examined the subject, the more I have felt convinced, that the impediments in the way of his being so treated, are rather technical than substantial; that they are too refined for common apprehension, or general acceptance. Such a construction of the statute would be, in my judgment, but to invite additional legislation, in order to reach what is now very satisfactorily expressed in the statute.

It can scarcely be claimed, I think, fairly, that the difference in terms between our statute and the statutes in Maine and New Hampshire, justify any difference of construction upon the point now under consideration. Our statute upon this very point is more comprehensive than in some of the States, where these decisions, treating a surety, as the party entitled to redress, as a creditor from the date of his suretyship, have been made, and no more perhaps than others, but they are all very similar, more so than the decisions in regard to them, very probably.

When Ch. J. WILLIAMS says, in *Brooks v. Claves, et al.*, 10 Verm. 54, "I apprehend that the word *right* is synonymous with debt or duty;" he is arguing against its extension to mean a mere right to attach his debtor's property. And in that sense we fully concur. It most undoubtedly is confined to rights, which are of the nature of debts; but was, very probably, inserted to reach cases analogous to the present, where an inchoate right or duty existed, but which had not become ripened or perfected into a debt. And a statute without some such provision, all must admit, would be sadly defective. The fact that it was inserted shows the sagacity of the framers. And still the statute is so drawn as to exclude rights in the nature of torts, as was held in regard to the Connecticut statute, in the cases cited by the defendant's counsel. But within the range of matters of contract, I do not perceive but that our statute is as extensive as that of the 13th Elizabeth, or most of the American statutes upon the subject. It seems to have been the purpose of the Connecticut statute, and of that of this State, following in the same path, (and far more so than those of many of the States where the doctrine has been held which we now hold, as in New Hampshire and Maine, where, I think, the controlling word is "creditor,") to exclude rights of the nature of torts, or not to include them. And if we construe the 24th section without reference to the 23d section, our statute giving the penalty to any party aggrieved, may be made as extensive as the New York statute. The party aggrieved, with no limitation, is as extensive as creditor, or any other person, but, most undoubtedly, our statute intends any person aggrieved, by having his right, debt or duty attempted to be defeated. In the original draft of our statute upon this subject, and until the revision of 1839, the right to avoid and to recover the penalty were both given, in one section and in

terms, to the same persons, as at present. As we are not able to see any reason why a surety should not be treated as a creditor, or as one liable to be aggrieved, by his principal conveying away his property, to defeat the "rights" of the surety, and evade the "duty" of the principal, in the implied obligation to save the surety harmless, the judgment in this case is reversed, and the case remanded for trial.

TURNER et al. v. GOODRICH.

Covenant of Warranty, Breach of.

In an action of covenant, upon the covenants of warranty, in a deed of land, if the covenantee have bought in an elder and better title, and which was asserted against him, this is equivalent to an eviction, and is a breach of the covenant.

But in such case the covenantee assumes the risk of proving the title so bought in, to have been elder and better than the title derived from his grantor.

To avoid this hazard, he must have given notice to his covenantor to defend against such title, and waited to be actually evicted by judgment of the proper tribunal.

In such case the covenantee is entitled to recover the amount necessarily paid, to buy the outstanding title, with necessary costs and expenses.

THE question raised and decided in this case, sufficiently appears, without any further statement of the facts, from the opinion of the court, by

REDFIELD, C. J. — The question involved in this case is, whether an outstanding title, at the time of entering into a covenant of warranty, which is elder and better than that of the covenantor, and which is asserted by bringing a suit against the covenantee, in possession of the land, and which he is compelled to buy in, to prevent being dispossessed of the land, amounts, in law, to a breach of the covenant. According to the old common law, after covenants of warranty came in use, instead of the more ancient feudal remedy, by *warrantia chartæ*, an actual eviction was necessary to be shown, in order to a recovery upon these covenants. But that rule is very considerably relaxed in England, as will appear by the cases referred to in the argument of the case of *Brown v. Taylor*, 13 Verm. 631; *Frayser v. Skay*, 18 Eng. Com. Law R. 441; *Hackett v. Glover*, 7 Petersd. 157; *Ib.* 236; *Smith v. Compton*, 23 Com. Law R. 106.

In the United States, the rule has been still further relaxed. As this covenant is chiefly a covenant for title, but

also for quiet enjoyment, it has been held, in this State, that if the covenantee find some one in possession of the land, he may bring suit, and if he fail to recover, this is *prima facie* a breach of the covenant, without notice to his warrantor to defend the title, and conclusive with such notice. *Brown v. Taylor*, and cases there cited. This is held equivalent to an eviction.

And in the case of *Williams v. Wetherbee*, 1 Aik. 233, it was held, that a final recovery against the covenantee, in possession, was a sufficient breach of the covenant of warranty, and that an actual ouster by writ of possession, was immaterial.

We have now the case of a suit, brought by one having an elder and better title, and before final judgment the covenantee, to prevent being dispossessed of the land, purchases in the title, at a fair rate. This, no doubt, in justice and moral equity, is the same thing as eviction.

As the covenant is intended to bind the covenantor, to defend not only the title, but the possession, and the rule of damages adopted in this State is also intended to indemnify the purchaser for the loss of both, it is highly just and proper that he should recover such indemnity, under the covenants of warranty. If the covenantee never takes possession, or if having taken possession, the outstanding title is not asserted against him, he may have full indemnity, by action upon the covenants of seisin. But when he is in possession of the land, and the suit is brought, or the title asserted, in any way perhaps, whereby it becomes impossible for the covenantee longer to maintain his possession, it is the same thing, whether he yields without suit, or after judgment, to a writ of disseisin and possession, or buys in the outstanding title at a fair rate. Of course, if he yields to a claim of title, without suit, or without judgment, on notice to the covenantor to defend his title, he assumes the burden of showing the title, to which he yields, good, and so also, if he purchases in the outstanding title, and in either case, he must rebut all possible implication of collusion. But this is matter of evidence, and when established, it should, and, as we regard the recent decisions, does constitute a breach of the covenants of warranty, and entitles the party to recover the amount paid to obtain the latter, and all expenses necessary in the premises, which must extend to the costs of the suit, while pending, and counsel fees. *Pitkin v. Leavitt*, 13 Verm. 379.

A summary of the cases upon this point will be found in Rawle on Covenants, pp. 234, 236, 237, 238, 239, *et seq.* The author assumes that the American law is fully settled to this extent. The cases in which the law is so decided, or so declared, are as follows: *Clapp v. Coble*, 1 Dev. & Bat., Ch. R. 177; *Sprague v. Baker*, 17 Mass. 590. In this case the outstanding title was in fact a mere incumbrance, and should have been so regarded probably; but the court held it a breach of the covenant of warranty, as a perfect title would have been, if asserted and brought in by the covenantee, to save being dispossessed under it. *Patton v. McFarlane*, 3 Penn. 425; *Dickinson v. Vorhees*, 7 Watts & Serg. 409; *Loomis v. Bedel*, 11 N. H. 74; *Brown v. Dickerson*, 12 Penn. 372.

The conclusion of the author, which seems to be fully justified by the cases, is, "That the weight of authority is in favor of the position, that the purchase by the covenantee, of an outstanding paramount title, when that title is actually asserted, will constitute such an eviction, as will entitle him to damages upon his covenants for quiet enjoyment, or of warranty, measured by the amount he has thus paid," and necessary expenses of course, according to the decisions in this State, and at common law. This rule, as applied to one who has entered into possession, under his deed, is no doubt the true rule, and I have no doubt is sustained fully, by the latest and best English decisions, upon this subject. Judgment reversed, and judgment for plaintiff, [deducting]¹ the larger sum found by the referee and the costs paid in the other suit to both parties, and interest, which were expenses necessarily incurred by defendant, in acquiring the title.

Washington, ss. — Term, 1854.

DUXBURY v. VERMONT CENTRAL RAILROAD.

In Vermont, where a town had a remedy against a railroad corporation for damages paid for a defect in a road built by the corporation, in lieu of an old road taken by them for the track of the railroad — it was held, that the town might also recover of the corporation the costs and expenses incurred in defending the suit against them for such damages, the corporation having been notified of the suit and having declined interfering.

¹ *Quære*, including. — Ed.

Semble, per REDFIELD, C. J. — The only question is, whether the town were justified in making the defence, and it is immaterial whether the defence is put upon grounds peculiar to the town.

JOEL BATTY recovered against the plaintiffs for damages sustained upon a new road, built by the defendants, in lieu of an old road taken by defendants, for the track of their railroad. The defendants were notified of the suit of Batty, but declined interfering. The plaintiff's claimed, and were allowed the costs and expenses of the former suit.

REDFIELD, C. J. — The only question made, in the present case, is, whether the plaintiff can recover the costs and expenses of the former suit in this case. The case of *Newbury v. The Conn. and Pas. R. Railroad Co.*, decided in Orange county, by this court, some three years since, and not yet reported, was almost identical with the present, and the question was then made and decided, that the plaintiffs were entitled to recover the costs and expenses of the former suit. The question was not made in that case, in regard to litigation, upon grounds peculiar to the town, and in which the railroad had no interest, nor is that question made here. It does not appear that any of the expenses incurred in the former suit in this case, arose from any such attempted defence; and we could not presume that, and for one, I do not well see, how any such distinction is maintainable upon principle. If the town were justified in making the defence, they were bound to make it upon every ground which seemed hopeful, as it seems to me. The only question seems to me to be, whether the town were justified in making the defence, but the costs, not allowed to be recovered in that suit, were such as accrued in trying the question of antagonist liability between the railroad and the town. But if in any case, one having an ulterior indemnity, may justly incur expense in attempting a defence, and be entitled to recover the amount of his guarantor, it would seem he should in this case. It was a matter of doubt as to the right of Batty to recover, and of serious difficulty, and one of which the railroad were informed, and which they neither assumed to solve by taking the burden of the defence, or directing its abandonment. The town then could do no less than make the defence.

1. It is now perfectly well settled in this State, and in England, and probably in most of the American States, that in covenants of warranty of title, and for quiet enjoy-

ment, the covenantee being evicted, is entitled to recover costs and expenses, as between attorney and client; notwithstanding it is also well settled, that the covenantee is not obliged to hold out against the claim of the evictor, until actual eviction, but may buy in his claim, when convinced that it is irresistible, and recover the amount paid, with previous costs and expenses. *Smith v. Crompton*, 23 Eng. Com. Law R. 106, is an English case, in the King's Bench, in 1832, which seems to have been well considered, and covers both points fully. *Pitkin v. Leavitt*, 13 Verm. 379.

2. This rule is not confined to cases of covenants for title, and for quiet enjoyment, or indeed to covenants of indemnity against suits, loss or damage, or to that class of contracts of indemnity, but extends to all cases of suretyship, where the claim was in its nature disputable; or unliquidated, and has generally been extended to costs recovered against the surety, in all cases, and to costs incurred by the surety in making defence, when it was done *bonâ fide*, and with a reasonable probability of success. *Deering v. The Earl of Winchelsea*, 1 Lead. Cases in Equity, note 102; *Wynn v. Brooke*, 5 Rawle, 106. In the case of *Hayden v. Cabot*, 17 Mass. 169, PARKER, C. J., thus lays down the rule in regard to the implied obligation to indemnify a surety: "If the surety pays voluntarily, he shall be reimbursed; if he is compelled by suit to pay, he shall also be indemnified for his costs and expenses." This seems to us more in accordance with sound principle, and the most reliable authority, than the decision of the same court, in the case cited in argument. *Lowell v. B. and L. Railroad Company*, 23 Pick. 24.

3. Finally it seems to us of the slightest possible consequence, in regard to expense, to the defendant in this case, whether the expenses were incurred in making defence in the first suit, or that were compromised by the town, and then the whole matter litigated in this suit, as it inevitably must have been.

Judgment for the plaintiff affirmed.

Supreme Court of New York—Special Term.

[Before MITCHELL, Judge.]

IN RE LEWIS TAPPAN ET AL.¹

Mercantile Agencies—Evidence — Rights of Witnesses, as to Self-crimination, when examined under Commissions from other States.

THIS was an application for an attachment against Lewis Tappan and Benjamin Douglass, for not answering interrogatories to a commission issued out of the Court of Common Pleas of Huron County, Ohio, wherein Beardsley et al. were plaintiffs, and Kinnan defendant.

MITCHELL, P. J. — Lewis Tappan was in the mercantile agency in this city until 1849, when he sold out to Arthur Tappan and Benjamin Douglass.

The interrogatories seem to be based on the supposition that the defendant, in 1847 or 1848, was an agent of the mercantile agency, and then communicated to the agency in writing a statement of the character of the plaintiffs, which was libellous. The answer shows (or it is understood) that it is the business of such an agency to record these communications, and to exhibit them to merchants inquiring as to the standing of the persons mentioned in them. The communications, and the records of them, may have been exhibited and so published (as the law terms it) every year since they were furnished; they may have been so exhibited by Lewis Tappan, although he has withdrawn from the business, and by Arthur Tappan and Douglass, who now have succeeded him, although they were not in the business when the communication was received. These two are now asked if Kinnan made such a communication in 1847 or 1848, and they decline to answer, because the answer may form a link in the chain of evidence which may tend to convict them of libel. As the exhibition of the paper may have been within a year, the statute of limitations would be no bar to a prosecution for libel, and so the respondents are not bound to answer on account of any supposed protection to be derived from that statute. The witness alone knows the facts beyond those contained in the answer, which may tend to his conviction; the court is not to compel him to tell what those

¹ N. Y. Times, July 15, 1854.

facts are. If, therefore, he says that the answer may tend to convict him, and on that account refuses to answer, and the court can imagine any state of facts under which the answer might lead to such a result, the witness may insist on the protection of the law, and refuse to answer. If these witnesses should answer yes, — such a communication was received from Kinnan at that time, — and they state its contents, and other witnesses prove that, within the last year, Lewis and Arthur Tappan and B. Douglass exhibited the letter from Kinnan as evidence of the plaintiff's character, the proof of these respondents' guilt might be made out, when, without their answer, there might be no evidence of the contents of the letter.

Examinations of witnesses under commissions from other States may be much abused, unless ample protection be given to the witnesses by our courts; and when the witnesses may be subjected to a civil suit in consequence of their answer, and (as in case of a libel which may be published in different States) may be subject to indictment in different States, and then not protected by any statute of limitations on account of non-residence in these States, our courts should use a jealous care to protect them. The honest ought not to be forced to be their own accusers, nor the dishonest to be tempted to perjury in order to save themselves.

In *The People v. Mather*, 4 Wend. 254, the rule as to the kind of questions which the witness may decline answering, is clearly stated; and, notwithstanding the broad language used in the statute, the Chancellor decided in a similar case, *in the matter of Kip*, 1 Paige, 607, that "The witness is not obliged to criminate himself, or answer any question which he would not be bound to answer if examined in open court; that the Legislature never intended to establish an inquisition by which witnesses should be compelled to criminate themselves, or to disclose secrets in which the party to the examination had no interest."

The other interrogatories are as objectionable as the one above specially referred to.

The motion for an attachment is denied.

*Supreme Judicial Court of Massachusetts, Suffolk, ss.
November Term, 1854.*

CHARLES PEABODY v. NATHAN W. HARMON.

*Insolvent Laws — Power of Commissioner in regard to the Examination
of a Creditor — Offering a Claim for Proof.*

It is within the discretion of a commissioner of insolvency to refuse to allow a creditor, examined before him, *viva voce*, upon oath, as to a claim offered by him for proof against the estate of an insolvent debtor, to consult with counsel as to his answers; and the decision of the commissioner cannot be revised by this court, upon a summary petition, unless, perhaps, in a matter essentially affecting the rights of one of the parties.

It seems, that a commissioner of insolvency has no power to imprison for contempt a creditor refusing to answer questions put to him with regard to his claim against the estate of an insolvent debtor.

THIS was a petition, filed on the 2d of December, 1854, representing that proceedings were now pending before the respondent, a commissioner of insolvency for the county of Essex, in the case of John Strain, an insolvent debtor; that the petitioner had a just and valid claim against the estate of said insolvent, evidenced by two promissory notes signed by said insolvent; that the petitioner duly made oath to said claim, and presented it to the commissioner at the first meeting of the creditors of said insolvent, to be proved against his estate, and proved the signatures of the notes; that the counsel of certain persons alleging themselves to be creditors of said insolvent, but who had not then proved their claims, were allowed by the commissioner to examine the petitioner, *viva voce*, upon oath, as to the amount, kind and value of his property, more than a year previous, and as to the interest which his wife then had in his property; that the petitioner desired to consult with his counsel, who was present, as to the propriety of the questions put to him, and his rights as to his answers, and attempted so to consult with his counsel; but that the commissioner refused, and ruled that during his examination he could not consult with his counsel on the subject: wherefore the petitioner prayed this court to issue a writ of mandamus or other proper process to the commissioner, commanding him to permit the petitioner to consult with his counsel at all proper times and for proper purposes, during said examination.

The respondent admitted the truth of the facts stated in the petition.

B. F. Butler, for the petitioner.

SHAW, C. J. — The personal examination of a creditor proving his claim against the estate of an insolvent debtor, after taking the formal oath required by St. 1848, c. 104, § 14, before a commissioner of insolvency, is very much in the nature of a cross-examination, and designed for the same purpose, to detect a false claim, if there is any reason to suspect one. We are not aware of any general rule of law, applicable to all cases, by which this court can declare that a creditor under examination, *viva voce*, in regard to the truth of his claim, independently of the particular question and the particular circumstances under which it is put, has, or has not, a right to consult counsel. There may be cases where a creditor, advancing a claim under suspicious circumstances, disclosed by a searching cross-examination, ought not to be allowed to gain time and elude its effect by intimidating the examination in order to consult counsel. In others, when the examination departs from the matter in issue, and may affect the party's own rights, and implicate himself in a criminal charge, or otherwise require a disclosure of facts against which the party is protected by law, he ought to be allowed the aid of counsel. It must depend much upon the judgment of the magistrate before whom, and for whose information the examination is had. Indeed this is implied in the petition itself, and an order from this court in the nature of a mandate, in the terms prayed for, would seem to be nugatory and of no legal effect. We are asked for an order to the commissioner, commanding him to permit the petitioner to consult with his counsel at all proper times and for proper purposes during the examination. This would, of course, refer it to the judgment of the commissioner to decide on each question upon the fitness of the occasion and of the subject. This authority, we think, he already has. If, in any case, it were allowable to break off in the midst of an examination, and come to this court by petition for directions, which, to say the least, is questionable, it must be when the commissioner decides wrong in a part essentially affecting the rights of one of the parties, in requiring or declining to require an answer to a particular question, or refusing or allowing the party under examination to con-

sult counsel in regard to his own rights, or the rights of those whom he is bound to protect.

The petitioner relies on the case of *Ex parte Winsor*, 8 Law Rep. 514, in which it was held by this court, that an insolvent debtor examined under St. 1838, c. 163, § 6, was entitled to consult counsel before making his answers. What was the particular question in that case does not appear. But there is a great difference between the situation of a creditor under examination as to his claim, and the condition of a debtor standing as it were upon his deliverance, and bound to make a full and complete disclosure of all his property and concerns. His title to a discharge depends on his making such full and true disclosure, and he is compellable to answer all relevant questions put to him, on pain of imprisonment. In this critical situation, a very tender regard should properly be had for the rights of the debtor.

It is said that this petitioner was in danger of being imprisoned for contempt if he refused to answer. But we can hardly think that he was in any such danger. In the strictly analogous case of the examination of a party in a common action at law, under the new Practice Act, if he refuses to answer, he is nonsuited or defaulted, as he may happen to be plaintiff or defendant, Stat. 1852, c. 312, § 72; that is, he loses his case; and that would seem to be all the ill consequence which the petitioner would suffer in this case. It may be an inconvenience to a creditor not to be able to prove his debt before an assignee is chosen; but it is an inconvenience which necessarily arises from the mode of trial required in these cases, to be conducted in the first instance in a summary way before a single magistrate. If the creditor refuses to answer, and his debt is rejected, for that or any other cause, he may appeal to the Court of Common Pleas, or to this court, according to the amount in controversy, Stat. 1838, c. 163, § 4, and have his case determined at law. If, in the course of such trial, according to the new Practice Act, either party desires to examine the other, it must be done by written interrogatories, to be answered in writing, in which case the petitioner, if again examined, will have full opportunity to consult counsel.

This is not a case for the summary interference of this court, and the petition must be dismissed.

Abstracts of Recent English Decisions.

*Equity.**Equitable Seizin — Tenancy by the Curtesy — Acquiescence — Waiver.*

In 1826 the plaintiff, as next friend of his daughter, then an infant, instituted a suit, to which he was not a party, in which she claimed to be equitably entitled in fee to two fourth parts of certain freeholds vested in trustees, he having been previously informed that there was a question whether he was not entitled to it as tenant by the curtesy. A decree for partition, whereby two fourths of the estate was allotted to his daughter in severalty, was obtained in 1830; and it was also thereby declared that the daughter, on the death of her mother, became entitled to "two-fourths of the estates in fee, and to the rents and profits thereof."

In 1833, the father still acting as next friend for his daughter in the suit, obtained an order of the court, approving of a deed of partition, containing a conveyance by the trustees, of two fourths of the estate in question, to the daughter in fee, and declaring that the father, his executors, &c., should have the use of the same for ten years, if the daughter should so long live, and remain an infant and unmarried, and from and after the happening of either of those events, to the daughter in fee; and providing, that the rents received by the father should be applied at the discretion of the father, towards the maintenance of the daughter. This deed was acted upon until the daughter attained the age of twenty-one, in 1843; after which period, until her marriage without her father's consent, in 1847, he accounted to her for the rents. The daughter and her husband subsequently brought an ejectment against the father, who thereupon, in 1852, filed a bill, alleging that he was entitled to the estate, as tenant by the curtesy, and that his title was not concluded by the suit commenced in 1826, to which he was not a party, inasmuch as it had been filed by him, as next friend, in ignorance of his own right to curtesy.

Held, affirming the decision of the court below, dissolving the common injunction obtained by the plaintiff, that he was not entitled as tenant by the curtesy, inasmuch as the proceedings he had taken, and his conduct from the filing of the bill in 1826, were equivalent to a waiver, as against his daughter and her husband, of his right to curtesy; and his representations to his daughter were of such a character, as that the marriage must be considered to have been contracted by her upon the faith of their correctness. — *Stone v. Godfrey*, March 6 and 16, C. A. C.¹

Will — Construction — "Next of Kin under the Statutes of Distribution" — *Husband*. A testator bequeathed a share of his personal estate upon trust, for the children of T. S. W., and directed that the shares of the daughters of T. S. W. should be subject to trusts, for the benefit of such daughters for life, with remainder to their respective children, who should attain vested interests as therein mentioned; and in case any one or more of such daughters of T. S. W. should die without leaving any child who should live to acquire a vested interest in her or their share, or respective shares, then such share or shares should respectively go to the person or persons who would, at the time of the decease of such daughter or daughters respectively, or of the decease or failure of her or their child or children respectively, which should last happen, be entitled as next of kin or otherwise, to the personal estate of such daughter or daughters respectively, under the statutes made for the distribution of intestates'

¹ Court of Appeal in Chancery.

effects. One of the daughters of T. S. W. died, leaving a husband surviving, but no child.

Held, that the husband was not entitled to her share. — *Milne v. Gilbert*, July 7, C. A. C.

Will — Construction — Accumulations — Whether included in Residue — Intestacy. A testator gave the residue of his personal estate, and the stocks, funds, and securities upon which the same should be invested, to trustees upon trust, to pay out of the income thereof, £600 to his wife for her life, and the residue to his brother and sister equally for life, as tenants in common; and, on the death of either of them in the lifetime of his (testator's) wife, then to apply his or her share for the maintenance of his or her issue; and, after the death of the survivor of his wife, his brother and sister to stand possessed of "the stocks, funds, and securities upon which his personal estate should then be invested," upon certain trusts for the children of his brother and sister. The testator's widow predeceased the brother and sister; the sister survived her brother.

Held, that a fresh residue was created by the latter clause of the will, and therefore that the accumulations of the brother's moiety of income, from his death to the death of the sister, passed under the gift to the children of the brother and sister. — *Re Drakely's Trust and the Trustees Relief Act*, July 3 and 6, R. C.¹

Will — Construction — Contingent Bequest over — Ambiguity as to Contingency — "Surviving" — Who take under Term. A testator, who had four daughters unmarried, and under twenty-one, gave £5000 to each of his daughters, "the interest of which to be for their use, independent of any husband they may have; and, if they have any children, the principal to be divided between them after her death, if they should attain twenty-one; if not, it is to be divided among her surviving sisters." One of the daughters died, leaving two children, both of whom died infants. Another of the testator's daughters predeceased the children of her sister.

Held, that the gift over took effect on the death of the surviving child of the deceased daughter under twenty-one, and that the two sisters only who survived the surviving child, took an interest in the bequest. — *Carter v. Burgess*, Dec 13 and 14, R. C.

Scotch Marriage Contract — Scotch Domicile — Change of — Construction — Foreign Law — Wife's Rights — Jus Mariti. A contract of marriage in the Scotch form, between a domiciled Scotchman and an English woman, though made in London, will be construed in England according to the law of Scotland, although the domicile of the parties is subsequently changed by their permanent removal to England.

By a Scotch marriage contract, the property of the wife, present and future, (in consideration of the covenants therein contained on the part of the husband), was assigned and made over "to and in favor of herself and her husband in conjunct fee and life rent, and the child or children that should be procreated of the marriage (divisible as therein mentioned), whom failing, the said wife, her heirs and assigns, in fee." The parties at the time of the marriage, were domiciled in Scotland, but subsequently became domiciled in England; and, after such change of domicile, the trustee of the will of the wife's father paid to the husband, on the joint receipt of the husband and wife, certain sums of money, part of the share to which the wife was entitled under her father's will. The trustee also paid a further sum, to which the wife was so entitled, to the assignees of the husband, who had become bankrupt. There still remained a part of her father's residuary estate, to a share of which she was entitled, to be divided. Upon a bill by the wife against the trustee, asking that he might

¹ Rolls Court.

make good the sums already paid, and that the part of the property still unpaid might be settled :

Held, that by the Scotch law the husband and wife could, under the terms of the contract, give a valid receipt for the property included in it; and therefore that the payments to the husband were good; but that the payment to his assignees was bad, as no valid receipt could be given by them.

Held, also, that the portion of the property which was yet unpaid, must be treated as the absolute property of the wife, subject to the life estate of the husband therein, and must be settled accordingly for the benefit of herself and her children. — *Duncan v. Cannan*, Dec. 16, 19, 21, and 22, 1853, and Jan. 20, 1854, R. C.

Married Woman — Power — Unauthorized testamentary Appointment — Codicil — Republication — What Property it includes. Where a married woman made a will, in exercise of all powers of appointment, and thereby appointed certain specific property, "and all other the manors and hereditaments (if any) which she had any power to appoint or devise;" and after she had become a *feme sole*, made a codicil, whereby she confirmed all wills which she had previously made.

Held, that the codicil did not republish or confirm the former testamentary appointment, so as, together with that instrument, to form a good disposition of certain property to which the testatrix was entitled, but which she had no power (as a married woman) to appoint. — *Du Hourmelin v. Sheldon*, July 10, R. C.

Drowning — Surviving — Presumption — Evidence. Two persons of different sexes, of very nearly the same age, were washed off the deck of a vessel together, and sunk in an eddy of whirlpool caused by the ship; and were not seen again.

Held, that in the absence of any evidence on the point, and there being no legal presumption in favor of the man surviving the woman, they must be considered as having died simultaneously. — *Underwood v. Wing*, July 18, R. C.

Practice — Costs. Heir at law disputing the will of a testator on the ground of insanity, though failing, allowed the costs of the issue at law, as it was not shown that he had raised the issue improperly or dishonestly. — *Waters v. Waters*, July 18, V. C. W. C.¹

Embezzlement by a Banker's Clerk — Felonious Acts not discovered till after Death — Bill by injured Parties as Creditors against the Estate of a fraudulent Intestate, whose Acts had amounted to Felony, allowed. A clerk to a banking company committed various acts of embezzlement against the company, and died intestate before the frauds were discovered. After his death, a bill was filed against his administratrix and heir at law, by the banking company, as creditors, praying for an account of the intestate's estate, and for payment of what was due to themselves and other creditors.

Demurrer, for want of equity to the bill, overruled with costs. — *Wickham v. Gatrill*, July 20, V. C. W. C.

Trader's Accounts — "Book-Debts." The executors of a trader, who had no partner, sold to his widow, amongst other personal estate and effects, his "book-debts." The books were irregularly kept, no balance being struck between the debtor and creditor accounts. It appeared from the books that the testator was indebted to various persons in trading and private debts, which same persons were also indebted to him in respect of trade debts.

¹ Vice Chancellor Wood's Court.

Held, that under the description "book-debts," only the balance, which arose after the testator's debts had been set off against his credits, passed to the widow.

Held, also, that the private debts of the testator ought to be included in the above account. — *Chick v. Blackmore*, May 31, V. C. W. C.

Feme Covert — Separate Estate — Wills Act — Power of Appointment by Will. On the marriage of Mr. and Mrs. V., freehold, leasehold, and personal property belonging to Mrs. V. was settled upon trust for her for life, for her separate use, without power of anticipation. The settlement also gave Mrs. V. a general power of appointment by will over the property; and in default of appointment the freehold estates were limited to her heirs and assigns, the leaseholds and other personal property to the children of the marriage. After the death of Mr. V., Mrs. V. made a will in exercise of the power as to all the property, and then married Lord D. privately. After this marriage she contracted debts by specialty under the name of Mrs. V., and died without having republished her will. Upon a bill, filed on behalf of the creditors and for the administration of her estate:

Held, first, that the will made by Mrs. V. in exercise of the power of appointment in her marriage settlement was, under the 1 Vict. c. 26, s. 18, revoked by her marriage with Lord D., so far as related to the freehold estates, but not as to the leaseholds and personal estate.

Secondly, that the exercise of the power did not render the appointed property assets for the payment of her debts contracted during coverture.

But *held*, on a re-argument, that the concealment of the second marriage amounted to an act of fraud, and that, in consequence of such act, the property which would have been liable had she been a *feme sole* for payment of her debts, was applicable for that purpose in equity; and also, that after the exhaustion of the general assets, including the real estate descended, the appointed property must, in this case, be treated as assets, and applied accordingly. — *Vaughan v. Vanderstegen*, Dec. 15, 16, 22, Feb. 23, April 25 and 21, and July 4, V. C. K. C.¹

Vendor and Purchaser — Misdescription — Compensation. Where property, including coal mines, was directed to be sold in lots, under an order of the court; the particulars of sale stated, as to lot 6, which was in the township of W. and W., "that it was a freehold farm containing 500 acres;" and added as to part of it, "80 cottages built of stone, and 8 cottages partly of timber, all in the occupation of the owners of Sedgehill Colliery, or their under-tenants and workmen." The Sedgehill Colliery was not under but adjacent to lot 6; the conditions of sale stipulated that "the mines and other minerals within and under such of the lots as are situate in the township of W. and W., and East B., should be reserved to the owners thereof with such powers and privileges as belong to them." The 88 cottages paid no rent, but the particulars and conditions of sale were silent on that point. The purchaser of lot 1 subsequently bought lot 6, on the assumption that the 88 cottages produced at least 264*l.* per annum. It appeared from the evidence that the said cottages were held under a deed dated in 1771; but the effect of that deed and the circumstance of the tenure of these cottages was not clearly shown; and the purchaser claimed compensation in respect of the 88 cottages from which no rent was derived:

Held, that it was the duty of a vendor when he puts up property for sale to inform himself (if he does not know them) of all the particulars of the premises he is going to sell; and in describing them, to state every

thing material to the condition and value of the property; and that a purchaser is not to be supposed cognisant of all the circumstances of the property from the fact of living near it; that no more knowledge can be imputed to him than may be gathered from the printed particulars of sale, and what any person might derive from ocular inspection of the property.

Held, also, that in this case the vendor ought to have set out the fact of the existence of the deed of 1771 in the particulars and conditions of sale; but as the effect of it and the circumstance of the tenure of the cottages was not clear, there ought to be an inquiry directed as to this latter point.—*Brandling v. Plummer*, July 23, V. C. K. C.

Unlawful Trust—Gift over to Trustee—Residue. A testator, by his will, gave to A. B. a sum of £1000 in trust to invest and accumulate, and pay the accumulated fund to any son he might have named John who should attain twenty-two years of age, and if the first son he should have and call John should die before twenty-two, then to the next son called John, and if no son called John should attain twenty-two years, then A. B. was to retain the £1000 for his own use. The testator then declared that his residuary estate should be divided among his pecuniary and particular legatees in proportion to the particular legacies. A. B. claimed to retain the £1000 on the ground that the legacy was void as being too remote; and the residuary legatees claimed it according to their shares of the residue.

Held, that the legacy was void, as given upon a trust which might continue for more than a life in being and twenty-one years.

Held, also, that the residuary legatees were entitled, and not A. B.—*Joy v. Aspinwall*, March 8, V. C. W. C.¹

Practice—Tenant for Life—Dividend—Solicitor. The court ordered payment of dividends from a fund in court to a tenant for life (a professed nun in a convent), on her petition, without directing inquiries; the court holding the solicitor responsible for the authority to file the petition.—*Re Holdsworth's Trust*, July 1, V. C. W. C.

Contract in Restraint of Trade—Compromise of Actions—Duress. A party against whom a verdict had been returned, and against whom other actions were pending, entered, with the advice of his solicitor, into an agreement for compromise with the plaintiff, who was a general dealer; one of the terms of which was, that he should give a bond for the payment of a stated sum if he should be "concerned in any trading establishment" within a specified territorial limit.

Held, upon a suit for specific performance of the agreement, that the bond must be given, for that it was not too wide in its terms; and that, the agreement having been entered into under the advice of a solicitor, could not be considered as executed under duress.—*Avery v. Langford*, July 7, V. C. W. C.

Contract of Marriage by Signs—Deaf and Dumb Woman. A woman deaf and dumb from her birth, contracted matrimony by license, a third party making the responses for her, and a child was born. Thirty years afterwards, and after her death, the validity of the marriage was disputed, on the ground of mental incapacity to understand and enter into the contract; but the court, being satisfied of her competency to understand, and of her fully understanding what she did, refused to direct an issue to try the validity of the marriage.—*Harrod v. Harrod*, June 26, 28, and 30, V. C. W. C.

Statute of Limitations—Part Payment—Acknowledgment—Appropriation. A debtor owed his creditor three debts on as many promissory notes. More than six years after the date of the first and second notes, the

debtor paid money on account of interest generally. The creditor, without the concurrence of the debtor, indorsed a memorandum on the third note of the receipt of his money on account of interest thereon.

Held, that this payment was not such an acknowledgment within the first section of the Statute of Limitations (4 Geo. 4, c. 14), as to enable the creditor to recover in a suit instituted within six years after the payment. — *Nash v. Hodgson*, July 4, V. C. W. C.

Gift — Completed Trust — Transaction inter vivos. A debtor made his creditor an executor. The debtor signed a cheque and handed it to his creditor, desiring him to keep a stated sum in discharge of his debt, to hold another part for a person named, and to place the remainder to the executorship fund. At the same time he signed a memorandum in writing to the same effect. The creditor sent the cheque in, and the money was paid to his credit at his own banker's. He retained his debt, and retained the money for the other party, and handed the remainder to the executorship account. In due time he paid over the money to the other party.

Held, as to this latter sum, there was a trust created for the donee, and that it was a complete gift *inter vivos*, and not a *donatio mortis causâ* — *Tate v. Leithead*, July 14, V. C. W. C.

"Money" and "Property" — Meaning of the respective Terms — Immediate vesting of Gift, but deferred Payment. Where a testator, possessed of foreign stock and railway shares, gave various annuities, and then gave all his books, and other specified articles, and "money" (except money at his banker's, or in the funds, or placed on security), "and all other property" not otherwise disposed of, to A. B., and directed that at the decease of the annuitants his whole personal estate should be invested in government securities, and transferred to four scientific and benevolent societies :

Held, first, that "money" must be taken in its strict legal sense, and did not include foreign stock or railway stock ; secondly, that "all other property" was not confined to articles *ejusdem generis* with those before enumerated and described, must be taken in its extended sense ; thirdly, that the gifts to the societies were not void, as tending to a perpetuity ; and, fourthly, that these gifts were immediate gifts, and that payment only was postponed ; and that the investment in government securities should not take place until the death of the last annuitant. — *Ludlow v. Stevenson*, June 29, 30, and July 25, V. C. W. C.

Vendor and Purchaser — Custody of Title-Deeds on Sale by Auction — "Largest Lot" — Costs. Where an estate was put up to sale by auction in lots, and by the conditions of sale it was stipulated that the purchaser of the "largest lot" should have the custody of the title-deeds, it was

Held, that the words signified the most extensive in acreage, and not highest in price.

The dispute being occasioned by the inaccuracy of the vendors in the wording of the conditions of sale :

Held, that they, and not the purchaser, must bear the costs of the litigation. — *Griffiths v. Hatchard*, July 18, V. C. W. C.

Voluntary Settlement — Trust — Notice. A. B. was *cestui que trust* of stock vested in trustees of his settlement for him absolutely. By a voluntary deed he assigned personal estate to trustees upon trust for certain persons, and he declared that, until the trust premises should be truly transferred, he would hold the same upon the same trusts. The stock was never transferred, and no notice of the deed was given to the trustees of the settlement in whose name it stood :

Held, that the stock passed by the deed, as there was a complete declaration of trust of it which the court would execute in favor of the *cestui que trust*. — *Donaldson v. Donaldson*, July 28, and August 1, V. C. W. C.

Legacy — Forfeiture by Bankruptcy — Cancellation of Debt — Discretion of Trustees. A testator gave a share of the residue of his personal estate to a grandson, to be paid at twenty-one, unless that should happen in the lifetime of himself (the testator), or of his daughter, and then to be paid as soon as conveniently might be after the deaths of himself and his daughter, and if he should become bankrupt or insolvent before his legacy became payable, his interest under the will should cease, as if he were dead. The grandson attained twenty-one in the lifetime of the testator, and became bankrupt during the lifetime of the daughter.

Held, that the share of the residue vested at twenty-one, and passed to his assignees.

The same grandson was a debtor to the testator in £3000, secured by a promissory note. The testator directed that, if his trustees were satisfied with the conduct of his grandson in respect to a particular partnership, then he gave the £3000 to the grandson absolutely. Soon after the testator's death, the grandson quitted the partnership, and the trustees were dissatisfied with his conduct.

Held, that the assignees of the grandson had no right to have the debt cancelled, but that the grandson's estate was liable in their hands in respect of it.—*Bird v. Johnson*, July 17, and 27, V. C. W. C.

Capacity to make a Will — Sound and disposing Mind — Delusions — Insanity. A lady afflicted with bodily illness, and subject to delusions, executed an instrument as her will. The same being disputed, an issue, *devisavit vel non* was directed, and a verdict was returned in favor of the will. Upon a motion for a new trial, the court being of opinion that upon the evidence the case in support of the will was not clearly established to its satisfaction, or that the alleged testatrix was free from continuous delusions at the time she executed the instrument, directed a new trial of the issue.

As to testamentary capacity, there is a wide distinction between two species of delusion, namely, such as are rooted delusions of insanity, and those which are only temporary delusions of delirium.—*Bennet v. The Duke of Manchester*, June 9, 13, 14, and July 1, 13, and 15, V. C. W. C.

"Eldest Child." Where a fund is directed to be divided between the "eldest child" of A. and the "eldest child" of B., the legacy is divisible between those who answer the description at the death of the testator.—*Re Harris' Trust*, May 4, and August 4, V. C. W. C.

Vendor and Purchaser — Principal and Agent — Agreement — Excess of Authority. A. B. gave his agents authority to let, and a qualified authority to state what was the selling price of property, but no authority to sell. The agents contracted in his name to let, with an option to the lessee to buy at a stated price. The lessor filed a bill to have the agreement delivered up to be cancelled, on the ground that the agents had exceeded their authority, and the lessee filed a bill for the specific performance of the contract.

Held, that the lessor, A. B., was entitled to have the contract set aside.

Where a party seeks to set aside a contract for sale entered into by his agents in excess of their authority, but confirms a contract to let, which was within their authority, he has a right, before any bill is filed against him by the lessee and asserted purchaser, for specific performance, to file a bill to have the agreement cancelled, offering to grant a lease if the lessee chooses; because, if he brought an ejectment, the contract to let would be an answer to his action; and if he had brought an action for rent, he might have been considered as acquiescing in the whole agreement, the contract to let and the contract to sell being in the same instrument.—*Wire v. Pemberton*, June 6, 7, V. C. W. C.

Time of Vesting of Legacies, where no Time is indicated in the Will. A testator gave legacies of a certain amount to all and every the children and child of all who, being a son or sons, should attain twenty-one, or being a daughter or daughters, should attain twenty-one or marry, with clauses for maintenance, education, and survivorship among them.

Held, that only such children of A. B. as were living at the time of the testator's death were entitled.—*Mann v. Thompson*, June 12 and 23, V. C. W. C.

Bequest to "a Chapel" — Payment. Where a bequest of money legacy is given to a "chapel at A. B.," the same is payable to the trustees of the chapel intrusted with its repairs.—*De Winte v. De Winte*, July 15, V. C. W. C.

Appeal from Court of Sessions in Scotland.

Railway—Director Contracting with Company—Illegality of Contract in Equity—Pleading—Companies' Clauses Act, 8 & 9 Vict. c. 16. A contract made by a director of a railway company, or by a firm of which he is a member, with the company, while he is such director, is bad on general principles; but these principles are enforceable only in a Court of Equity, and are not recognized in a Court of Common Law. Hence, though *Foster v. Oxford, W., and Wolverhampton Railway Company*, 13 C. B. 200, may have been rightly decided in the C. P., it is no authority in a Court of Equity, for the Companies' Clauses Act does not make valid such a contract which is otherwise bad on general principles.

B., a director, of the A. Railway, and a member of the firm of B. brothers, while he was such director, entered into a contract with the company to supply a large quantity of iron chairs at a certain price. The company, after accepting delivery of part, refused to receive the rest of the chairs, whereupon B. instituted a suit in the Court of Session, which is a court both of law and equity, praying that the company might be decreed either to specifically perform the contract, or pay damages for the breach of contract. The company pleaded that, "under the Companies' Clauses Act any such contract, to which the plaintiff B. was a party while he remained a director of the company, was illegal and cannot be enforced."

Held, reversing the decision of the Court of Session, that this plea sufficiently raised the general question, whether such a contract is illegal, and that it merely assigned a wrong reason for such illegality, viz., the provisions of the Companies' Clauses Act.

Held, also, that such a contract was bad in equity, and, as the court below was a court of both law and equity, it ought to have decided in favor of the validity of the plea.—*Aberdeen Railway Co. v. Blaikie Brothers*, July 20, H. L.

Common Law.

Lease—Condition precedent—Performance of Covenants—Construction—Covenants impossible of Performance. A. demised a colliery and farm to B. for forty-two years. The lease, which was under seal, contained a great variety of minute covenants on the part of the lessee, and there was this proviso: That if B. should be desirous to quit at the end of the first eight years, or at the end of the first or any subsequent three years after the expiration of the said eight years, and should give to A. eighteen calendar months' notice, "then and in such case (all arrears of rent being paid, and all and singular the covenants and agreements on the part of the said lessee having been duly observed and performed) this lease, and every clause and thing herein contained shall, at the expiration of the first eighth year, and thereafter at the expiration of any such third year

(whichever in the said notice shall be expressed,) cease, determine, and be utterly void of all intents and purposes, in the like manner as if the whole of the said term of forty-two years had then run out and expired; but nevertheless without prejudice to any claim or remedy which any of the parties hereto, or their, &c., may then be entitled to for breach of any of the covenants or agreements hereinbefore contained."

Held, affirming the judgment of the Ex. Ch. (which reversed the judgment of the Ex.) that the performance of all the covenants and agreements on the part of the lessee, however trifling, and though some of them were practically impossible of performance, constituted a condition precedent to his exercising the right of determining the lease by notice. — *Grey v. Friar*, Aug. 5, H. L. Error from Ex. Ch.

Construction of Agreement — Occupation of Premises as Tenant or Servant. In an action for breaking and entering the plaintiff's house, the plaintiff set up by the pleadings a right of possession to the house as tenant to the defendant under an agreement, which recited that the house was in the possession of the defendant; that the sale of beer and porter had been carried on therein by a third person on the defendant's account, and that plaintiff was desirous of carrying on the trade there for the defendant; and then provided that the plaintiff should and might, from the date thereof, enter upon the premises and conduct therein the trade in the place of and in the same manner and on the same terms as that third person, until the agreement should be determined by the notice therein-after mentioned. By the same instrument the plaintiff on his part agreed to carry on the business for the defendant, to take from the defendant all the beer and porter to be consumed on the premises, and not to part with the trade or occupation without defendant's consent. It was also further agreed that, upon receiving one month's notice from defendant, plaintiff should, without being paid commission, deliver up possession of the premises, and, upon giving one month's notice, should be at liberty to leave the business and quit the occupation. No notice to determine the agreement had been given on either side.

Held, upon the construction of the agreement, that the plaintiff did not occupy the premises as tenant to the defendant, but as a mere servant, and that consequently the action could not be sustained. — *Mayhew v. Sutcliffe*, June 24, Q. B.

Deed of Partition — Construction — Land — Surface — Minerals. A. and B. being seised of M. and T. farms, and the mines and minerals under the same, by deed of partition, conveyed the same to S. to hold the same, as to M. farm, to the only use of A. and his heirs, and assigns for ever, and as to T. farm, to the only use and behoof of B., his heirs and assigns for ever. The deed recited the agreement of partition, and that by the said agreement "all coals, cannel, &c., and all mines to be found within the said premises, should be taken by and between them under such payments, restraints, and liberties as in the said deed were after mentioned;" and then conveyed to S. and his heirs the manors, lands, and hereditaments comprising M. and T. farms, and all the estate, right, title, interest, use, trust, possession, property, &c., of them A. and B. in, to, or out of the said hereditaments and premises, to hold to S., his heirs and assigns for ever, upon the trusts therein mentioned. And the deed then provided that all ore, coal, mines, &c., and the rents and profits of such mines and minerals to be gotten within the said premises, shall be had, received, and taken, and the costs of getting and carrying away the same, and all trespass and damages done on the lands thereby, shall be paid by A. and B. equally, in such manner as if the lands wherein the same shall be found had not been divided, allotted, or conveyed, but still remained in common

between them: provided that he in whose lands such minerals may be found may get and dispose thereof in such manner as he shall think fit, paying to the other one half of the profits thereof, after deducting such costs and payments as aforesaid:

Held, by the above deed, a complete partition was effected of the lands, surface, subsoil, mines, and minerals, and that the proviso was only for the purpose of working the mines at the joint expense and for common profit, without prejudice to the separate ownership. — *Bateman v. Williamson*, June 30, Q. B.

Covenant to repair — Action by Assignee of part of Reversion — Partial merger of Term — Surrender — Suspension of Right to sue — Prevention of Performance by Plaintiff's act.

A. demised to G. for ninety-nine years, ending 25th Sept. 1849; and G. underleased to V. and S. for twenty-five years and a quarter, ending 25th March, 1848; and V. and S. demised to T. for twenty-three years, ending 24th June, 1848. G. afterwards, by deed, granted his reversion to S. and B. and L., and V. afterwards assigned to S. all his interest in the lease from G. to V. and S.; whereby the term as to one third became merged in the reversion. S. died before the determination of that lease by effluxion of time; and after such determination, B. and L., as assignees of the remaining two thirds of the reversion, sued V. upon the covenant to repair. V. pleaded that after the death of S. and T., A., the original lessor, had sued B. and L. for non-repair upon the covenants in T.'s lease; and that that action had been settled by an agreement, to which V. was not a party, whereby the representative of T. agreed to give up possession of the premises to A., and B. and L. agreed to concur in executing a surrender of the lease as soon as all claims against V. or others relating to the premises should have been satisfied; but that in the mean time the lease should be deposited with a third person in trust for A., and to be produced for the purpose of enforcing any such claims. The plea alleged, that in pursuance of that agreement possession of the premises had been delivered to A.; and that thereby V. had been prevented from performing his covenant.

Upon demurrer thereto:

Held, that the plea was bad, inasmuch as the agreement and delivery of possession to A. did not operate as a surrender of all the plaintiff's interest, and was not intended so to operate; and inasmuch as V., the defendant, not being a party to the agreement, might, at the expiration of T.'s lease, have entered for the residue of his term and repaired.

Held, also, that the declaration was good, inasmuch as the plaintiffs were entitled to the whole reversion which remained, and were not prevented from suing as assignees under stat. 32 Hen. 8, by reason of the partial merger of the term. — *Badeley v. Vigurs*, June 30, Q. B.

Sunk Vessel — Buoy — Accident. It is the duty of a person using a navigable river with a vessel of which he is possessed and has the control and management, to use reasonable skill and care to prevent mischief to others; the liability is the same whether the vessel be in motion or stationary, floating or aground, under water or above it. The liability may be transferred with the transfer of the possession and control to another person; yet, on the abandonment of such possession, control, and management, the liability may cease.

Unavoidable accident producing the wreck of a vessel, no duty arises to the owner to take any precautions, or to remove impediments to the navigation. — *White v. Crisp*, June 5, Exch.

False Imprisonment.—In false imprisonment it is a good plea that the defendant apprehended the plaintiff on a reasonable suspicion of felony; but

Semble, it is not enough that the suspicion was merely *bonâ fide* — *Sayer and Wife v. Lichfold. Exch. N. P. Before Parke, B.*

Threatening Letter — Menaces — Stat. 7 & 8 Geo. 4, c. 29, s. 8. Quære, whether a letter, falsely accusing the prosecutor with being the father of the writer's illegitimate child, and stating that, unless the prosecutor sent her some money for its support, she must apply to the parish and take harsh measures, is a letter demanding money, "with menaces, and without any reasonable or probable cause," within the meaning of the statute 7 & 8 Geo. 4, c. 29, s. 8. — *Regina v. Pearce, July 11, Oxford Circuit, Before Crompton, J.*

Ecclesiastical Law.

Testamentary Papers — Revocation. Two dispositive documents, not repugnant to or revocatory of each other, but each appointing different executors, were held together to constitute the will of the deceased, there being nothing to show a contrary intention. — *Richards v. The Queen's Proctor, January 14, P. C.*¹

Miscellaneous Intelligence.

NON-LIABILITY OF CAB-OWNERS FOR LOST BAGGAGE. — On Saturday, in the Bloomsbury County Court, an action was brought by Marmaduke Charles Salvin, Esq., of Burn-hall, Durham, to recover from the defendant, Mrs. Kartwright, a cab proprietor, £25, the value of a portmanteau and contents, lost by the alleged negligence of the driver. The plaintiff was conveyed from the Great Northern Railway to Manchester square, and his luggage, consisting of two portmanteaus and a box, was placed outside, but on arriving at Manchester square, a portmanteau was missing. The driver said it must have been stolen or shaken off. Mr. Lewis, for the defendant, submitted, that he was entitled to a verdict, since no negligence was shown, and the defendant had let the cab out to the driver, and was therefore not responsible for the conduct of the driver. Moreover, it appeared that the complainant had himself gone to the railway station to see if the luggage was left there, showing that he was not certain that it had been placed on the cab. It was also contended that the cab-drivers were not in the position of common carriers. The driver said that only two packages were given to him at the railway by the porter. The learned judge said he did not consider cabmen in the light of common carriers, which would render them liable for such losses, and, as no negligence had been proved, his verdict must be for the defendant, with costs. — *Law Times, Aug. 26.*

COURTESIES OF THE EXECUTIVE AND JUDICIARY. — A singular exchange of courtesies took place, a short time since, between Judge Pepper, of the 7th Judicial District of Tennessee, and Governor Johnson, of the same State. Judge Pepper, who was a blacksmith, presented to Governor Johnson a fire-shovel, made by the Judge's own hands. The Governor accepted the present, and, being a tailor by trade, returned the compliment by cutting and making with his own hands, a coat, which he presented to the Judge. — *New York Inquirer.*

¹ Prerogative Court,

A MISERLY CHIEF JUSTICE.—Jekyl said that Kenyon died of eating apple-pie crust at breakfast, to save the expense of muffins; and that Lord Ellenborough, who succeeded to the chief justiceship in consequence, always bowed with great reverence to apple-pie; "which," said Jekyl, "we used to call apple pie-ty." The Princess also told of how the King used to play tricks on Kenyon, sending the Dispatch Box to him at a quarter past seven, when he knew Kenyon was snug in bed; being accustomed to go to bed at that hour to save candle-light.—*Moore's Diary*.

LORD DENMAN.—The event of the week is the death of Lord Denman. He had been long failing; he had reached the natural term of life; and the intelligence will be received with respectful grief, but without surprise. For Lord Denman had been a distinguished man in his day. He had filled a large space in the public eye—first from his association with Lord Brougham and others in the Queen's trial, and afterwards as filling the post of highest dignity, though not of loftiest rank, in this kingdom—that of Lord Chief Justice. As a lawyer he was not great; as an orator he was very inferior to his marvellous colleague in that famous trial. He was doubtless indebted for much of his professional success to the gifts of nature—his commanding form, his magnificent face, his dignified bearing. Though born of the middle class, the stamp of nobility was upon him. In person, as in manner, he was the *beau ideal* of a Chief Justice.—*Law Times*, Sept. 30.

A QUARTER OF A CENTURY'S IMPRISONMENT FOR DEBT.—Mr. Payne has held an inquest at the Queen's Prison, on the body of Emma Davidson, otherwise Sarah Hawkins, aged 57, who died in the prison on Monday last, after an illness of some months' duration. The deceased was somewhat of an eccentric character, and had been in confinement since 1829, having made a solemn vow when arrested that she would "live and die" in prison, as she considered the claims against her to be unjust. She was in the receipt of an income of about a £100 a year, regularly paid to her out of property of which she was in possession when first arrested, under the provisions of an Act now abolished.—*Ib.*, Oct. 1.

A DARING VILLAIN.—A man named Armand appeared a few days ago before the Imperial Court at Amiens, as appellant from a condemnation to fifteen months' imprisonment for *rupture de ban*, passed on him some time before, by the Tribunal of Correctional Police. As he had been condemned eight or ten times for the like offence, the court instead of reducing the punishment, raised it to five years' imprisonment. No sooner had the president pronounced the sentence, than the prisoner hurled at him with great violence, a stone as large as his fist, which he had secreted beneath his blouse. "There," cried he, "take that for your five years." The president turned his head aside, and fortunately the stone only struck him on the left shoulder. Some *gend'armes* immediately rushed on the man and bound him. As they did so he cried, "I have kept that stone secreted fifteen days expressly to throw at him, and I deeply regret it did not hit him in the head and kill him." For this outrage the court at once condemned the man to seven years' hard labor. It might have imposed the sentence of death, or hard labor for life. It does not appear the man had any personal animosity against the president, but had determined to be avenged on the judge who would condemn him, whoever he might be.—*Galignani*.

A SANDWICH ISLAND JUDGE.—Of all the characters on the group, no one is more interesting than that of a native judge. A singular specimen

of this *genus homo* I found residing within the precincts of Kualoa. His house was constructed on the native plan, but his domestic comforts were rather superior. He was a judge, and that made the difference. He resided in the centre of a village, containing six or seven other dwellings. His legal profession constituted him a sort of lord over his surrounding brethren, for they all looked up to him with feelings somewhat akin to reverence. He had no rosewood book-cases well filled with elegantly bound and ponderous volumes; but a single shelf contained his papers, and some half dozen books, from which he had drawn his legal inspirations. His house contained a few articles for domestic use that would not have disgraced the residence of many a thoroughly civilized man. Everything was arranged with scrupulous care as to the best side being placed toward the gaze of the visitor, and all was proverbially neat and clean. He had so adjusted the insignia of his office, that his own countrymen might at once be impressed with the majesty that civil law extends to its faithful disciples. The judge himself was a fine looking fellow, about six feet high, well proportioned, and with a hand that might well have belonged to a high-born patrician woman. His entire physiognomy was that of a lawyer.—*Sandwich Island Notes.*

A NEW CAUSE FOR CHALLENGING A JUROR. — In the Court of Oyer and Terminer, a gentleman named William Harrison was called as a juror in the case of Charles Jager, charged with the murder of John Moran. Mr. Spenser, counsel for the prisoner, after finding out that the juror was an undertaker, said he should challenge him peremptorily because of his occupation, which was a too great familiarity with death. The juror was rejected. — *N. Y. Eve. Post.*

A JURYMEN'S JEU D'ESPRIT. — The Court of Common Pleas in Suffolk County was occupied some time since with a trial of an appeal from a Justice of the Peace in an action relating to the *felloes* and *tires* of certain wheels. The counsel occupied in the argument of the case much more time than its importance seemed to require, and a member of one of the juries perpetrated the following lines, in which we have substituted other names for those of the gentlemen mentioned.

"Saunders and Smith, two lawyers shrewd,
Though they themselves may like the sport,
Talking of *felloes* and of *tires*,
Tire all the *felloes* in the Court."

MR. CURRAN AND LORD CLARE. — "Lord Clare had a favorite dog that sometimes followed him to the Bench. One day during an argument of Curran's, the Chancellor, in the spirit of habitual petulance which distinguished him, instead of attending to the argument, turned his head aside, and began to fondle the dog. The counsel stopped suddenly in the middle of a sentence, — the judge started. — 'I beg pardon,' said Mr. Curran, 'I thought your *Lordship* had been in consultation; but as you have been pleased to resume your attention, allow me to impress upon your excellent *understandings* that —, &c.' " — *Curran's Life by his Son.*

NOVEL MOTIONS. — A young gentleman newly called to the Bar, and not thoroughly acquainted with legal contractions, had a brief put into his hands with the following indorsement upon it: —

Nokes v. Styles. — Instructions.

Mr. Leatherhead, 1-2 gua.

"To move for a *Common* to examine witnesses."

The young gentleman accordingly moved the court, "My Lords, I humbly move your Lordships for a common to examine witnesses."

"What, Sir?" said the Chief Justice. "I humbly move for a common to examine witnesses." "Pray, Sir," said the Chief, "are your witnesses numerous?" "Yes, my Lord." "Then take Salisbury Plain." — *Westminster Hall*, Vol. 3.

Notices of New Books.

REPORTS OF CASES argued and determined in the Supreme Judicial Court of Massachusetts. By HORACE GRAY, JR. Vol. I., Part I., pp. 370. Boston: Little, Brown, and Co. 1854.

It is very gratifying to notice the commendable promptness with which Mr. Gray has issued the first number of his Reports.

Although the statute directing the reports to be published by the first day of September in each year, has not been, and, perhaps, could not be strictly complied with, yet Mr. Gray is so far in advance of his predecessors, in obedience to a law which of late does not seem to have been regarded as binding on the reporter—and we do not say that some relaxation from its literal requisitions must not be expected—that we feel greatly obliged to him, and, it is to be hoped, that he will observe the same promptness during the whole period of his continuance in office. We are now enabled to ascertain, from an authentic source, the decisions made by the Supreme Court, in Suffolk County, at the March Term of the year 1854.

The last volume of Mr. Cushing's Reports ends with the cases decided at the closing of the year 1851, and there are then the cases decided in the interval between 1851 and 1854 yet to be reported. We venture to hope that we may see them in print at no very distant period of time.

The general appearance of this number of Mr. Gray's Reports, is certainly highly creditable and very satisfactory. There are, however, some errors of detail which it may be desirable hereafter to notice and to correct. We should be glad to see a fuller statement of the facts in some of the cases, than that contained in the opinion of the court. It is never fair, and generally impossible, to judge of the correctness of a decision without a full knowledge of the facts on which it is founded. It is to be regretted, too, that the reporter is not at liberty to omit cases of no value, instead of being required, as he is by the statute, to publish reports of the decisions on all legal questions argued by counsel, although of no earthly importance to any one but the parties.

We find in this volume decisions upon important points of principle and practice. Under the former head fall the cases of *Fisher v. McGirr*, *Commonwealth v. Albro*, and *Henrick v. Smith*, in which the chief justice gave a most luminous and unanswerable opinion, declaring the fourteenth section of the liquor law of 1852 unconstitutional.

Parton v. Herve touches one of the most important and delicate relations of life. The case declares the validity of marriages made in this State between boys of fourteen years and girls of twelve years of age, even without the consent of their parents or guardians. A model opinion is given in the case by Mr. Justice Bigelow.

Porter v. Judson deals with the duties of holders of notes and of Nota-

ries Public, and points out the course to be pursued by them in reference to finding the maker, and making demand upon him. The case shows that it is not safe to place a note in the hands of a notary, for the purpose of making demand and giving notice, and not, at the same time, to impart to him all the information possessed by the holder, by which the notary may find the residence of the parties of whom demand is to be made, and to whom notice is to be given.

The point decided in *The Boston and Worcester Railroad Corporation v. Dana*, in reference to the admissibility of abstracts from voluminous books and documents sometimes offered in evidence upon the trial of a case, has a very important bearing upon the practice in the great multitude of cases now on the court dockets, brought by Mutual Insurance Companies for the recovery of assessments, in which the most complicated calculations and computations are to be made from numerous entries, votes, and other data. The mode of proof pointed out will afford great relief to juries, and save an infinite deal of time in the trial of such cases.

It would be quite useless, and entirely out of place, to say a word of the evident ability, great learning, and palpable general correctness of the decisions in these Reports. Ability, learning, and accuracy are so characteristic of the decisions of the Supreme Court of Massachusetts by universal acknowledgment, that the exceptions only, if any, can be the subjects of question and discussion.

There are several decisions in this number that are worthy of more than a mere passing notice. Such is the decision in *Lord v. Wheeler*. The facts of this case invited a discussion of a very important question upon the broadest general principles. It was, however, decided on very narrow grounds; and there is at least a doubt whether the grounds taken were sufficient to sustain the decision, if it had been otherwise unsupported. The facts, as we gather them from the opinion of the court, were these: — A workman, who was employed to repair a house and out-buildings for a certain sum, and who had nearly completed the repairs, was allowed to recover for labor done and materials furnished, before he had entirely completed his job, on the ground that the buildings were destroyed by fire, and the owner had entered and occupied them before the fire occurred. It did not appear that the fire was attributable to the fault or negligence of either party. The distinct reason given for the recovery is, that the defendant, being the owner of the buildings, moved into them by himself or his tenant, when the contract was substantially finished, and that this was a severance of the contract, and an acceptance *pro tanto*. The expressions "substantially finished" and "nearly completed" mean here the same thing, and are, in fact, employed as convertible terms. Now the job was either finished or it was not finished — if finished, then the money agreed to be paid was due, and no severance was necessary to enable the plaintiff to recover it. The occupation of the buildings might or might not be an acceptance, but it could not sever a contract already completed. If the job was not so far completed, that it might fairly be said in law to be finished, then it was quite as easy to sever it in one place as another, when it was half done, as when it was nearly, but not in law actually, finished. There can be no doubt that the circumstances attending the entry or occupation of a house by the owner, while a workman is repairing it by the entire contract, might be such as to justify a jury in inferring an acceptance of the performance *pro tanto*, and a severance of the contract. But we think it does not, by any means, necessarily follow, as a rule of law, that, when a man agrees to pay another a certain sum for repairing his house, under an entire contract, the owner severs the contract, and accepts partial performance, by merely moving into and occupy-

ing the house. Take a case most likely to occur. — A man resides in the city during the winter, and during the summer in the country. While at his summer residence, he engages a workman to slate his city house by an entire contract, stipulating that the workman shall find the slate and put it on for a specific sum. When the time arrives for the owner to return in the autumn, the slating is not done, but he is obliged to move into the house; and does so, without interfering with the action of the workman. Can the workman stop at once and sue the owner for labor and materials, or for a part performance, on the ground that the contract has been severed, or that such part performance has been accepted?

The truth is, the moving into and occupying the house under such circumstances, not only might, but in general would, have no relation to the slating or the state of the labor. It might be more convenient for the owner to have the laborers about his house, when he is absent — but the job may be done whether he is in or out of the house; and the moving in and occupying, while the job is in progress, does not change the nature of the contract, or release the workman from any of its obligations. The case does not in principle differ materially from that in which the owner of a house has it slated for a specific sum while he is residing in it. The return and moving in, unless attended by other circumstances, are of no more importance than the staying in. Surely a man may have his house slated by the job under a specific contract, while he is residing in it, and the fact that he is residing in it does not sever the contract; if it did, no binding contract could be made in such a case. That the plaintiff in *Lord v. Wheeler*, was entitled to recover something, there could be no doubt. This being admitted, there must, of course, be some reason for it.

When the workman engaged to repair the buildings, the owner by a corresponding obligation agreed that he should have the buildings to repair. Every shingle, or board, or piece of slate, fastened upon the buildings became a part of them — and consequently became the property of the owner of the buildings — as fast as the work progressed. The buildings being at his risk, the accessions were so also. And when the buildings were destroyed the loss fell upon the owner of them, including that of the accessions. *Res perit domino*. But the buildings being destroyed without the fault of either party, the workman is excused from going on with his contract, because the owner is no longer in a condition to furnish him with the buildings to finish his contract on. The owner may be excused from furnishing the buildings because they have been inevitably destroyed. The owner is not then in a condition to sue the workman for not completing his contract, and the workman may not be in a condition to sue the owner for not suffering him to complete it. The owner cannot recover for a non-performance — nor the workman for an entire performance. The casualty itself severs the contract, so that neither party can enforce its completion. The parties stand precisely as if they had mutually agreed to stop where the fire found the buildings, and setting aside the future obligations of the contract, to settle according to a fair division of their existing rights under it. Why should the owner pay the workman? Why should not the latter lose the labor and materials furnished? The workman should not lose the labor and materials because they are no longer his to lose. They have been added to the buildings and have thereby become the property of the owner of the buildings. And the owner should pay for them because they have become his, and he has really had the benefit of them, not for the reason that he has entered and actually enjoyed them, but because the buildings were his, and the labor and materials increased their value to the time of the accident. Before the fire the owner could have sold his buildings for the increased value — he might have insured them for the increased value, and recovered it in

full. As there was an increase in value to the property of the owner, so there was a decrease to the same extent of the property of the workman, in his labor and materials furnished. The property of the workman now consists of his rights under the contract; he has no longer any property in the labor and materials bestowed. The owner having had the labor and materials of the workman, the latter, being in no fault, is entitled to his compensation. But the contract is not entirely set aside, the incident has not perished with the principal. The contract is still in force, so far as it has been performed, and still regulates the compensation. Upon these principles it is clear that the workman would be entitled to a certain proportion of the contract price, according to the proportion of the job finished, but not to a *quantum meruit* for labor and materials furnished. The latter might amount to more than the whole original contract price, but more than that the workman cannot recover upon any principle.

The case of *Commonwealth v. McKie*, invites more attention than can be bestowed upon it in this notice. We may advert to that and some others at a future time.

REPORTS OF CASES argued and determined in the Court of Appeals of the State of New York, with Notes, References, and an Index, by Henry R. Selden. Vol. 2. Albany: W. C. Little & Co., 1854. In this court, as many important questions are decided as in any other, and our readers, we doubt not, would be glad to have an account of some of its decisions. Those we give we shall give briefly, and refer to the book itself for statements, and reasons, and limitations.

The court decide That payment on a running account, no specific application being made, will be applied in equity to the first items, though the creditor held security for them, and none for the final balance.

That an award extending the day of payment on a contract discharges sureties.

That money deposited generally becomes the money of the depository.

That affinity by marriage is not a sufficient consideration in a deed of bargain and sale.

That a right of re-entry for non-performance of any condition is not an estate in land; and a person re-entering is in by a forfeiture of condition, and not by reverter.

That the owner of lands on a navigable river, in which the tide ebbs and flows, has no private right or property in the waters of the river, or in the shore between high and low-water mark.

That a sale of lumber on credit, and a conditional delivery of it for transportation by the purchaser to consignors for sale, in the name of the original owner and as his property, the avails to be paid to him, with the deduction of an amount already paid, give to the purchaser no title to the property, nor any authority to sell it, nor to create a lien on it for advances.

That a note or memorandum required by the Statute of Frauds must be subscribed underneath, or at the end of such note or memorandum.

That a married woman cannot incur an obligation binding her personally for the expense of protecting property held by a trustee for her use.

That a trustee has a lien on a trust estate for the expense of protecting it, though not expressly provided for in the instrument creating the trust; he may effectually charge such expenses on the future income of the estate, without becoming personally responsible for their payment; and the estate in the hands of a new trustee remains subject to the charge.

That a testator must declare the instrument to be his last will, in the presence of all the attesting witnesses.

That a notice of protest, erroneous in some particulars in the description

of the note, may be aided by evidence that there was no other note to which the notice could be applied.

REPORTS OF CASES argued and determined in the Superior Court of Judicature of New Hampshire. By WILLIAM L. FOSTER. Vol. IV. pp. 615. Concord, N. H.: Published by G. Parker Lyon. 1854.

The opinions in this volume, to which we have been able to give but a cursory examination, sustain the high character which the Superior Court of New Hampshire has acquired, and are of practical value and interest beyond the limits of its jurisdiction. There are several cases of interest relating to railroads, and we would particularly call attention to the case of *Moses v. The Boston and Maine Railroad*, as affecting the rights and duties of such corporations as common carriers. There are several important cases on the law of evidence. The number of questions arising upon pleading, revives our early recollections of a title of the law which seems almost fading out of our practice in Massachusetts. The character of the jurisprudence of New Hampshire might furnish a strong argument in favor of its retention as part of a judicial system. The only adverse criticism that we can make upon the volume is, that the abstracts of cases might, in some instances, be a little abbreviated. We do not consider it the purpose of a marginal note, in any measure, to reproduce the case, but only to set forth the principles of general application which are settled by it.

Insolvents in Massachusetts.

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Commissioner.
Adams, Nathan, 2d	Provincetown,	Nov. 3, 1854,	Timothy Reed.
Alexander, Wm. et al.*	Boston,	" 27,	John P. Putnam.
Barrett, Francis	Weymouth,	" 25,	Francis Hilliard.
Blake, Alonzo C.	Springfield,	" 23,	Henry Vose.
Bodwell, Nelson	Boxford,	Oct. 5,	N. W. Harmon.
Bridges, Charles H.	Clinton,	Nov. 20,	C. H. B. Snow.
Brown, James W.	Boston,	" 14,	John P. Putnam.
Burditt, George W.	Charlestown,	" 21,	Isaac S. Morse.
Burrell, Robert F.	Stoughton,	Dec. 1,	Samuel B. Noyes.
Capen, Wm. W.	Boston,	Nov. 8,	John M. Williams.
Chambers, Andrew †	Lowell,	" 6,	Isaac S. Morse.
Clifford, Thomas	Lawrence,	Sept. 11,	N. W. Harmon.
Coates, John	Barnstable,	Nov. 21,	Timothy Reed.
Conant, Leonard	Taunton,	" 18,	Timothy Reed.
Conant, Rufus L.	Marshfield,	" 17,	John M. Williams.
Coombs, John	Newburyport,	Sept. 27,	N. W. Harmon.
Copeland, Franklin	Roxbury,	Nov. 23,	John P. Putnam.
Curtis, Salem N.	Worcester,	Dec. 1,	T. G. Kent.
Cummins, Thomas R. et al.†	Dorchester,	Nov. 7,	John P. Putnam.
Dalton, Peter	West Bridgewater,	" 6,	Welcome Young.
Dana, Edmund W. et al.‡	Boston,	" 15,	John P. Putnam.
Dana, Stephen W. et al.‡	Boston,	" 15,	John P. Putnam.
Day, Amos B. et al.‡	Boston,	" 16,	John P. Putnam.
Dorby, Charles W.	Attleborough,	" 1,	Edmund H. Bennett.
Dodge, Benj. W.	Charlestown,	" 2,	Charles Demond.
Drake, Robert E.	Newburyport,	Oct. 10,	N. W. Harmon.
Dresser, Henry W.	Lowell,	Nov. 30,	Isaac S. Morse.

* For Notes to the above references, see next page.

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Commissioner.
Evans, Horatio	Boston,	Nov. 18, 1854,	John P. Putnam.
Evans, John P. et al.*	Boston,	" 27,	John P. Putnam.
French, John A.	Boston,	Sept. 11,	Charles Demond.
Frye, Fred. A.†	Salem,	Nov. 23,	John G. King.
Galligan, Peter	Boston,	Sept. 30,	Charles Demond.
Gilbert, Joseph A. et al.†	Boston,	Nov. 7,	John P. Putnam.
Hale, Daniel L. et al.‡	Boston,	" 16,	John P. Putnam.
Hale, Ezekiel	Haverhill,	Oct. 20,	N. W. Harmon.
Hamilton, John K.	Quincy,	Nov. 13,	Samuel B. Noyes.
Harvey, Edwin	Palmer,	" 17,	Henry Vose.
Heath, Enos	Boston,	Oct. 11,	Charles Demond.
Hodges, Benj. M.	Andover,	June 7,	N. W. Harmon.
Holbrook, Lewis	Millbury,	Nov. 10,	T. G. Kent.
Hudson, Leonard R. **	Worcester,	" 27,	Alexander H. Bullock.
Hudson, Orlas **	Worcester,	" 27,	Alexander H. Bullock.
Ireland, Jeremiah R.	Newburyport,	July 3,	A. W. Harmon.
Johnson, L. A.	Salem,	Nov. 6,	John G. King.
Josselyn, Ozen	Quincy,	" 29,	Samuel B. Noyes.
Kimball, Caleb F.	Stoughton,	" 14,	Samuel B. Noyes.
King, Benjamin F.	New Bedford,	" 4,	Elnathan P. Hathaway.
Kingman, Damon	Sharon,	" 15,	Francis Hilliard.
Knawton, George	Salem,	" 27,	John G. King.
Knowlton, Lozano C.	Shrewsbury,	" 15,	Alexander H. Bullock.
Loring, William M.	Boston,	" 26,	Charles Demond.
Lovett, George W.	Charlestown,	" 1,	John P. Putnam.
McIntosh, Hiram P.	Newburyport,	June 7,	N. W. Harmon.
Metcalfe, John W.	Bellingham,	Nov. 16,	Francis Hilliard.
Munroe, Jonas	Attleborough,	Dec. 11,	Edmund H. Bennett.
Newcomb, Lewis	Quincy,	Nov. 23,	John P. Putnam.
Newton, Abraham H.	Worcester,	" 24,	T. G. Kent.
Norton, Francis ††	Springfield,	" 9,	Henry Vose.
Ordway, Fred. J.	Cambridge,	" 6,	Asa F. Lawrence.
Osborne, Oliver W.	Somerville,	" 1,	Asa F. Lawrence.
Oxford, Joseph M.	Boston,	Sept. 22,	Charles Demond.
Page, Francis A.	Lowell,	Nov. 13,	Isaac S. Morse.
Perley, Samuel	Haverhill,	June 23,	N. W. Harmon.
Pollard, Amory	Berlin,	Nov. 29,	A. H. Bullock.
Polley, Francis	Walpole,	" 23,	Francis Hilliard.
Poole, John	Newburyport,	July 3,	N. W. Harmon.
Porter, Wm R.††	Salem,	Nov. 23,	John G. King.
Raymond, George F.	Weymouth,	" 20,	Samuel B. Noyes.
Reed, John, §§ (deceased)	Boston,	" 29,	John M. Williams.
Rick, Sylvanus	Dorchester,	" 7,	John P. Putnam.
Robinson, John L.	Lynn,	" 15,	John G. King.
Sawyer, Bernard	Lowell,	" 15,	Isaac S. Morse.
Scott, Horace } partners	Whately,	" 1,	David Aiken.
Scott, Luther G. }	"	"	"
Seaverns, John L. et al.‡	Boston,	" 7,	John P. Putnam.
Savoy, Saml. C.	Boston,	" 9,	John P. Putnam.
Sittler, Charles R. †	Lowell,	" 6,	Isaac S. Morse.
Skiff, James M.††	Springfield,	" 9,	Henry Vose.
Smith, Benj. H.	Attleborough,	" 20,	Edmund H. Bennett.
Sprague, Henry	Melrose,	" 15,	Asa F. Lawrence.
Storey, Jacob, et al. §	Chelsea,	" 16,	John P. Putnam.
Strain, John	Lawrence,	July 31,	N. W. Harmon.
Taft, Atanson	Mendon,	Nov. 27,	Alexander H. Bullock.
Taylor, Luther	Yarmouth,	" 29,	Timothy Reed.
Tenney, John	Amherst,	" 21,	I. F. Conkey.
Towne, Stephen P.	Danvers,	June 22,	N. W. Harmon.
Tuttle, Henry H. §§	Boston,	Nov. 29,	John M. Williams.
Tyler, Benjamin O.	Winchendon,	" 25,	C. H. B. Snow.
Varney, Shadrach	Charlestown,	" 14,	Isaac S. Morse.
Webster, Heman	Methuen,	Oct. 3,	N. W. Harmon.
Wellman, Asa	Charlestown,	Nov. 26,	Asa F. Lawrence.
Whittemore, James F.	Boston,	Oct. 14,	Charles Demond.
Wilson, Jacob	Lawrence,	Aug. 31,	N. W. Harmon.

* Evans & Alexander.

† Sittler & Chambers.

‡ John L. Seaverns & Co.

§ Dana & Co.

|| Hale, Day & Storey.

†† Porter & Frye.

** L. R. & O. Hudson.

‡‡ Skiff & Norton.

§§ Reed & Tuttle.

THE
MONTHLY LAW REPORTER.

FEBRUARY, 1855.

THE WARD TRIAL. MR. CRITTENDEN.

To the Editors of the Monthly Law Reporter :¹

IN the review of the Ward trial in your July number, 1854, the facts and incidents detailed by you as a part of the history connected with that trial are so grossly perverted and misrepresented, that it is not less an act of justice to yourselves, than a tribute to the cause of truth, to call your attention to the evidence which will correct and disprove them. The high character which your journal has sustained with the profession throughout the Union, the undoubted ability and legal learning displayed in its editorials, the unvarying impartiality which has characterized its course, and its manly defence of the profession from the assaults of ignorance and malevolence, constitute sufficient evidence that you have made no wilful perversion or misrepresentation to affect the character or standing of any one connected with this celebrated trial. Yet no one can read the article referred to, who is intimately acquainted with the facts, but must be convinced that you have been furnished with the history you have published from the partisan source which has so perseveringly and malignantly misrepresented the distinguished gentleman "*who volunteered his services*," or that you have not been

¹ The following communication, written, as we are informed, by a member of the Bar of Kentucky, has been forwarded to us with the request that it might appear in our journal. — Ed.

sufficiently careful in scrutinizing the evidence of the truth of many statements you have made calculated seriously to affect him.

You speak of the "intense indignation" created in Louisville by the announcement of the verdict of acquittal. "The jury," "the prisoner," "the swift witness" for the defence, "and even some of the counsel were burnt in effigy." This is true; but in a journal professedly devoted to the inculcation of the doctrines of law and order, in a long article, the whole tone of which seems to be intended as a slur on Kentucky justice, and in which you complacently contrast Kentucky with your own "more favored State," it is a matter of no little surprise that mob violence should not only pass unrebuked, but receive an implied sanction by your endorsement "of the character of the persons who composed it and directed the proceedings." You say, "It was not a tumultuous mob, nor assembled by persons ever ready to take advantage of any occasion of public excitement. It was mainly constituted of, and *altogether* directed by, intelligent, educated and influential citizens, who appeared to feel, with solemn conviction, that the verdict had done foul wrong to the name and honor of Kentucky, and had converted the proceedings of justice into a contemptible farce. By a not unnatural process of mind, this deeply-seated, irrepressible indignation turned itself against the prisoner's counsel, and especially against the distinguished gentleman who volunteered his services." You add that "Deputations and addresses from all parts of the State have urged him to resign his seat in the United States Senate; a society in a neighboring State withdrew its invitation to him to officiate upon some public occasion; a convention of medical gentlemen at St. Louis, who before the trial would have deemed themselves honored by his presence, so far forgot their self-respect as openly to insult him."

A more unfair presentation of this case, or a grosser perversion of all truth, has seldom before been embodied in the same number of words. It is alike due to truth and justice to give a brief but authentic history of this peaceable, and quiet, and orderly meeting, "*altogether directed by intelligent, educated, and influential citizens.*"

On Friday, the 28th of April, a hand-bill addressed "TO THE WOLFE BLOODHOUNDS OF LOUISVILLE" was issued from the office of the "Louisville Democrat," and the next

morning the following was published in the "Louisville Courier," in a conspicuous manner :

"TO THE WOLFE BLOODHOUNDS OF LOUISVILLE.

FELLOW 'BLOODHOUNDS,'

The most atrocious murder ever perpetrated in any community was the killing of Mr. W. H. G. Butler by Mat. F. Ward. It is a sacred and solemn duty to the dead, and to the now blackened and dishonored name of Kentucky, from whence truth has fled and justice has been disregarded, to call a meeting of the 'Wolfe Bloodhounds of Louisville,' that we may give expression to our feelings in reference to this most OUTRAGEOUS VERDICT of a Hardin county jury, and the man who dared stigmatize American citizens as

'BLOODHOUNDS,'

because they desired justice to be done the murderers of the lamented Butler. We propose this (SATURDAY) NIGHT, AT THE COURT HOUSE, the time and place for MEETING.

Come one, come all, and let Kentucky give evidence that there are men that money cannot buy. Turn out, fellow 'BLOODHOUNDS,' and vindicate yourselves. There will be speeches and resolutions expressive of the *just indignation* of our citizens.

THE PEOPLE."

This notice, and others similar to it, were scattered by thousands over the city on Saturday morning. No one in the city was, or could be, ignorant that such calls invoking the people to assemble as "Bloodhounds," would bring together a mob of the most violent character. As evidence of what was expected, Mr. Robert J. Ward, the father of Mat. F. Ward, was advised, and he did abandon his residence. Mr. N. Wolfe, one of the counsel, also abandoned his house. The Mayor of the city advised the people, and the fact was previously well known, that Mat. F. Ward, and his brother, Robert J. Ward, Jr., were not in the city. Instead of calling the meeting for daylight, it was to be after night. When the hour arrived, the Court House hall was soon filled to overflowing, and the Court House yard was also filled. Many of the most respectable citizens of Louisville went into the Court House, with a view, as far as possible, to allay the public excitement, and prevent violence.

They passed resolutions, but had the decency to make

no allusion whatever to the course pursued by Mr. Crittenden. Far different was the scene enacted in the Court House yard, and as you allude to the natural process of mind, by which the "*irrepressible indignation*" was turned against the distinguished gentleman who volunteered his services, it must, of course, be to this meeting that you refer, when you say it was "*altogether* directed by intelligent, educated, and influential citizens." Old clothes were bought and stuffed and brought to the scene of action, to represent the objects of popular vengeance. Resolutions were passed, that Mr. Nat. Wolfe must resign his seat in the State Senate, and go to parts unknown; that "Mr. Crittenden must resign his seat in the United States Senate," and that "the Wards must depart to their Arkansas plantation." The effigies of John J. Crittenden, Nathaniel Wolfe, George D. Prentice, Matt. Ward, and the jury of Hardin county were hung up and burned. In the mean time, a crowd, estimated at between two and three thousand, assembled around the mansion of Robert J. Ward, the father, stoned the house, destroyed the windows and window-sash, demolished an extensive glass conservatory, full of the rarest plants and flowers, and finally set the house on fire in front. The Louisville Journal, in giving an account of the incidents of this fearful night, says:

"The fire bells were sounded, and the Kentucky and Mechanic Fire Companies were the first to arrive at the scene of the conflagration. They laid their hose, but the mob immediately cut it with their *bowie knives*, and thus rendered the engines useless. The Washington and Hope companies then arrived and laid their hose, and forthwith a leader of the rioters, drawing a weapon, swore that he would kill the first man that took a pipe, but the threat did not avail. Henry Green and Jacob Bernel took the pipe of the Washington, and Dr. W. R. Jacob that of the Hope. D. W. McCarty, as chief director of the Washington, protected his pipe, and Henry Smith and Mr. Bly stood below protecting and lightening his hose. A pistol was aimed and snapped at the pipe director, within a few feet of his breast, but it missed fire. Two or three pistols were discharged, yet the dauntless firemen did their duty without quailing in the midst of ten times their own numbers, and the flame was soon conquered. The Washington company, when all was over, stationed thirty men at Mr. Ward's house, who stayed there all night to meet any sub-

sequent attack of the incendiaries. It was ascertained the next morning, that a fire had been kindled upon the carpet in one of the chambers, with a view to the certain destruction of the house, but it had gone out of itself, thus disappointing the expectations of the 'Bloodhounds.'"

The above extract has been given from the Journal, because it was copied into the Daily Courier of the 3d of May, which paper had been charged, in conjunction with the Democrat, with getting up the mob by their incendiary publications. From the comments of the Courier may be gathered what are the admitted facts attending this transaction. The Editor commences by saying that D. W. McCarty was an employee of the Courier office; that when he arrived at the residence of Mr. Ward, "he was firmly, but not boisterously told that he had better let things alone." Of the persons stationed all night to protect the house, three were employees of the Courier office. He continues: "The Journal states that the hose of one of the engines was cut with bowie knives, and thus rendered useless. At one time, a similar demonstration was made upon the hose of another of the engines, when a number of firemen and citizens sprang to its protection." He adds: "Mr. McCarty was the first person who was permitted to go up stairs after the house was entered by the Washington's pipe. He found the doors all fastened, so as to satisfy him that no rioter or other person had been there for mischief. The carpets were warm, and some of the paint was melted and running, but he discovered no appearance of a fire having been kindled in either of the chambers as stated by the Journal, and is certain that no such outrage had been committed or attempted."

After remaining a long time around the house of Mr. Ward, the mob started off for the house of Mr. Wolfe. It is said, that they seemed bent upon its destruction, and that it was the avowed determination of many of them to take Mr. Wolfe's life if they could find him. However this may have been, they refused to listen to Col. Preston, the distinguished member of Congress from the Louisville district, and it is said, greeted him with insults.

Mr. Thomasson a former member of Congress from the same district, made also an ineffectual effort to address them. At length Mr. Gibson rose, and on account of having been one of the prosecuting attorneys against Matt. Ward, they listened to him, and were dissuaded from further violence,

but still eggs and pavement stones were thrown, before the mob would depart. This whole proceeding, which every decent man out of Louisville, has not hesitated to pronounce infamous, you have described as "A meeting remarkable, not only for its extraordinary numbers, but equally so for the character of the persons who composed it, and directed the proceedings." Upon what evidence you have drawn these conclusions it is difficult to conjecture. Your allusion is to that meeting which by a natural process of mind, you say, turned its indignation against the prisoner's counsel, and especially Mr. Crittenden. That meeting, before any report of his speech, simply because he had volunteered to defend the son of an old and long tried friend, denounce him in unmeasured terms, say that he must resign his seat in the United States Senate, and burn him and others in effigy, yet you say, that this meeting was "constituted of, and altogether directed by, intelligent, educated and influential citizens."

It is a vile slander upon the intelligent, educated and influential citizens of Louisville. Many such may have been and doubtless were present, led there from curiosity or to repress violence, but we deny that the proceedings were directed by them, or even countenanced by them. Such men had nothing to do with the atrocious outrages of that night; they had nothing to do with the burning of such a man as John J. Crittenden in effigy; they could not and did not countenance, as we must presume, the sending forth of the "bloodhound," hand-bills, as evidence of their intelligence and education; they did not join in the hue and cry against the father, to excite public vengeance against him, because he had exerted himself to save his son; they did not direct the lawless outrages upon his property; they did not afterwards make light of it, by calling it sneeringly, mere "flower-pot indignation."

The offices from whence the bloodhound hand-bills were issued, seemed especially anxious to show that they were paid for printing them. With all the partisan excitement growing out of this whole affair, they could not help feeling that some apology for such a document was necessary on their part.

After endorsing the character of this lawless mob, to give force to its coarse condemnation of Mr. Crittenden, you add, that "Deputations and addresses from all parts of the States, have urged him to resign his seat in the United States

Senate." This statement is utterly destitute of truth. No one in Kentucky has ever heard of a deputation or an address to him to resign his seat in the United States Senate. It is true that meetings have been gotten up mostly in obscure places, generally sparsely attended, where resolutions to that effect have been passed, but in every instance where an investigation into such meeting has been made, it has resulted in showing it to be composed of a few noisy persons acted upon by extraneous influences.

In one instance a meeting was published as having been held at Rumsey, in McLean county, in which the conduct of Governors Crittenden and Helm was severely condemned. Mr. Dyer, who was named as one of the persons acting a conspicuous part in that meeting, in a letter to the Editors of the Courier, in which paper the proceedings were published, says: "The fact is, there has been no such meeting in this county or its vicinity, or any attempt to get up a meeting on this subject; there is not one word of truth from the beginning to the end of this forged and spurious record. Had such a meeting been got up here, I will venture the assertion, that no resolutions could have passed any respectable meeting of our citizens, stigmatizing in such indignant language, such men as J. J. Crittenden and J. L. Helm." We have no hesitation in saying that Mr. Crittenden's course is fully approved by the great mass of the legal profession in Kentucky. The bar in a distant circuit have passed strong resolutions to that effect, and the following letter has been signed by upwards of forty members of the bar practising before the Court of Appeals of Kentucky, endorsing in decided and emphatic terms, his whole conduct.

"Frankfort, Ky., Sept. 12, 1854.

TO HON. J. J. CRITTENDEN,

Dear Sir, — The undersigned members of the Bar, practising before the Court of Appeals of Kentucky, have witnessed with regret and mortification, the newspaper attacks upon you for appearing as counsel on the trial of Matt. F. Ward; and feeling that it is not less an act of justice to the profession to which they belong, than to yourself, one of its most distinguished ornaments, beg leave, without entering into detail, to express to you their conviction, that there has been nothing, either in the manner of your appearing, or in the conduct of the case, on your part, inconsistent with the

highest professional propriety, and that your entire conduct has met their full and cordial approbation. We have the honor to be, &c."

"A society in a neighboring State, withdrew its invitation to him to officiate on some public occasion."

This also is untrue. Mr. Crittenden, some time before he appeared on the Ward trial, was invited to make an address before an Agricultural Society in Indiana, which, from other pressing engagements, he was compelled respectfully to decline. He declined before he ever appeared in the Ward case. At a meeting held at Hanover College, Indiana, after the regular resolutions were adopted, the following was offered.

"Resolved, That we, a portion of the citizens of Jefferson county, are decidedly of opinion that we can do without the services of Mr. John J. Crittenden of Kentucky, at our next County Fair."

This is the whole foundation for the publication of the statement that "A society in a neighboring State withdrew its invitation to him to officiate on some public occasion." How, and in what manner this resolution was passed, is fully explained in a letter from a student of Hanover, dated May 6th, 1854, and published in the Louisville Journal of 11th May, thereafter, in which he says:—

"The President, Mr. Dunn, made a motion that the resolutions be adopted. After that form was gone through with, Mr. Latinore, a young student, jumped up and pulled out a strip of paper, from which he read about as follows: 'Gentlemen, Mr. Crittenden has been invited to visit our State Fair next fall and make a speech. I make a motion to invite him to stay at home.' (A long pause!—a good many sneers!) at length, 'I second the motion,' was heard from one of the boys. Mr. Dunn arose and said: 'Well, gentlemen, there is a motion made and seconded, that we invite John J. Crittenden to stay at home—all in favor of this motion will say aye.' A few feeble ayes were heard—then says he, 'those to the contrary say no.' *No, no, no*, was thundered all over the house. The President took his seat, looked very much embarrassed, and said, 'I make a motion that we adjourn. Those in favor of this motion say aye.' 'Aye' was heard in every part of the house, and then we adjourned."

And this is the foundation for the alleged indignity offered

to Mr. Crittenden in a neighboring State. You, finally add, that "a convention of medical gentlemen at St. Louis, so far forgot their self-respect as openly to insult him."

This is doing not less injustice to the Convention, than to Mr. Crittenden, but, like all the rest of this entire paragraph, it is absolutely false. It is true that this statement was made and published in the papers which have manifested such persevering and bitter hostility to Mr. Crittenden, but even these papers have made a retraction by subsequent publications. After the alleged insult, Mr. Crittenden was invited by this Convention to their public entertainment, with a request that he would respond to a toast to be read on the occasion. The whole story of this insult, which has been so widely circulated, and which after being fully refuted at home, has been re-issued in your journal, was founded upon the following incident.

Mr. Crittenden being at St. Louis, visited the Hall in which the Medical Convention was then assembled. A point of order was under discussion. A young member of the Convention, observing him in the room, proposed that he should take the President's chair, then filled by another, in order that the proceedings should be conducted according to strict parliamentary rules. For this the mover was hissed by some of the members present. They have disclaimed any insult to Mr. Crittenden, and were deeply mortified that any such construction should have been placed upon their conduct.

The whole excitement against Mr. Crittenden, in this State, grew out of the fact alone, of his having volunteered in this case. Before it was known what he had said, or what course he had pursued in the defence of his client, he was denounced for having volunteered, and the indignation expressed against him was on this account alone.

You have nobly and eloquently defended him for this act, and we cordially unite with you in saying, "It is passing shameful that a lawyer like Governor Crittenden, against whom, hitherto, no word of reproach has been uttered, should be pursued, insulted and persecuted for no other reason than because in the great distress and heavy affliction of an intimate personal friend, he volunteered those services, which that friend had abundant means, and doubtless ample inclination, to pay for if required. Shame upon any one, who will say that money should have pur-

chased what friendship had no right gratuitously to bestow."

It is well known that the excitement against Matt. F. Ward was very great. The testimony before the examining court was published with severe and bitter comments in two of the city papers, and while the prisoners were in the custody of the law, and incarcerated in close prison, judgment was passed, in advance, upon them; their conduct denounced as diabolical, the public mind inflamed by pronouncing the deed as atrocious as any to be found mentioned in the records of modern crime, declaring that no act had ever come within their knowledge that had so little to palliate it, and much more of the same kind. However a course of this kind might be calculated to shock the moral sense of every legal mind, when the prisoners were in the custody of the law, and awaiting their trial upon the unbiassed testimony which might be brought against them, altogether uninfluenced by popular clamor, it yet had its effect in inflaming the passions of many good men, and in rendering them, according to our well established canons of practice, unfit triers of the alleged crime. For not thus prejudging this case, George D. Prentice, the able and accomplished Editor of the Louisville Journal, was burnt in effigy, and even the respectable meeting in the hall of the Court-house, in reference to this matter, resolved, "That a failure of any portion of the press, to rebuke and condemn an atrocious crime against society, tends to debauch the public virtue, and to destroy the public morals." In advance of the trial, one paper of wide and extended circulation, after indulging in bitter denunciations, declared, "When crimes like this occur, it is our duty, it is the duty of every one having control of the columns of a public Journal, to speak of them as they deserve. He who fears or fails to do so, is false to his obligations to society, and unfit for the position he holds." With an excitement of the public mind, so diffused as these comments were so well calculated to effect, a timid politician, or a timid lawyer, might hesitate before engaging in a defence.

The father of the accused was well aware of the fearful excitement existing against his son. With a delicacy and magnanimity characteristic of him, although exceedingly anxious to have the services of his old friend, Mr. Critten-

den, he forbore to make personal application to him, for fear it might result to his disadvantage or injury in a political point of view. Mr. Crittenden learned this fact from mutual friends. To use his own language, "Mr. Ward and himself had long been personal friends, and a friend he was, to be loved and valued." He adds, "When he was in the deepest distress and agony, it was made known to me that he desired I should appear as counsel for his sons, then imprisoned and awaiting their trial, under a heavy load of prejudice and excitement. Could I, as a professional man, could I, as a *friend*, have refused to do so? No, I could not."

He was not ignorant that a greater or less degree of clamor would be raised against him in case he appeared. Had he been governed by the timid counsels of some of his friends, he would have kept out of the case. But he is not the man to be thus influenced; throughout a long life of unblemished integrity and professional honor, he had acted upon the principle that the bar was the great bulwark and security of the accused and forsaken, from the angry assaults of prejudice or passion. The unblenching courage that leads counsel to stand between the hot avenger and his victim, was his; and woe be, say we, to that truckling and time-serving lawyer who shall falter for an instant in his courage or his efforts in such a case.

"The very responsibility," says he, "of appearing in the case, under the existing excitement, made it the more necessary for me to do it, or appear to be a timid lawyer and worthless friend."

You have illustrious instances of lawyers in your own renowned and venerable Commonwealth, who, under trying circumstances, braved the fury of the moment, and interposed their learning and influence to check the torrent of passions which threatened to banish reason from her throne:

On the evening of the 5th March, 1770, the town of Boston was thrown into a state of dreadful agitation by a murder of five citizens in the streets by a party of British soldiers, under the command of Capt. Preston. You know that the very highest pitch of rage and indignation was excited among the inhabitants of Boston, as well as the whole people of Massachusetts. The populace breathed only vengeance; that deep-seated political animosity which afterwards burst forth into successful revolution, gave in-

creased violence to this vindictive spirit. After deliberation and consultation with each other, John Adams and Josiah Quincy, Jr., yielding all personal considerations to the higher obligations of official duty, at the request of Capt. Preston, who solicited their professional services, agreed to appear in his behalf, and in that of the soldiers. They knew that they were putting to a fearful hazard the confidence of their political friends, their popularity, and that general affection which their public course had attained for them. The aged and venerable father of Mr. Quincy heard the rumor that his son had engaged to act as counsel for the prisoners, and addressed him the following letter :

"My dear Son,—I am under great affliction at hearing the bitterest reproaches uttered against you for having become an advocate for those criminals, who are charged with the murder of their fellow-citizens. Good God! is it possible? I will not believe it. I must own to you, it has filled the bosom of your aged and infirm parent with anxiety and distress, lest it should not only prove true, but destructive of your reputation and interests; and I repeat, I will not believe it, unless it be confirmed by your own mouth, or under your own hand.

Your anxious and distressed parent."

It has been truly said, that there is nothing in the annals of the bar, or in the records of human courage, loftier in sentiment or more correct in principle, than the reply of the brave and noble-hearted son. It is needless to copy it at large, so well known and so justly appreciated as it is by the legal profession, but we cannot resist the temptation of quoting a few sentences. He tells his venerable parent that, "Before pouring their reproaches into the ear of the aged and infirm, if they had been friends, they would have surely spared a little reflection on the *nature of an attorney's oath and duty*, some trifling scrutiny into the business and discharge of his office, and some small portion of patience in viewing my past and future conduct. Let such be told, sir, that these criminals charged with murder are *not yet legally proved guilty*, and, therefore, however criminal, are entitled by the laws of God and man to all legal counsel and aid, that my duty as a man obliged me to undertake; that my duty as a lawyer strengthened the obligation; that from abundant caution I at first declined

being engaged ; that after the best advice and most mature deliberation had determined my judgment, I waited on Capt. Preston and told him that I would afford him my assistance ; but prior to this, in the presence of two of his friends, I made the most explicit declaration to him of my real opinion on the contests (as I expressed it to him) of the times, and that my heart and hand were indissolubly attached to the cause of my country."

If Mr. Crittenden had timidly shrunk from appearing in this case, how sadly would his course have contrasted with the heroic and high-principled sense of duty which controlled the conduct of John Adams and Josiah Quincy, Jr. He did not, however, hesitate or falter as to the line of duty to be pursued by him. He says in his letter to a friend in New Orleans: "After considering the matter, and the repeated solicitation of common friends, I determined not to reject the appeals made to me, but to appear in the case, and to render to the accused such professional services as I could. I determined also that I would receive no fee for my services. I believed that I might exact almost what amount of compensation I pleased, and that was felt by me as a reason why I should take none. I shrank from the idea, or appearance even, of bargaining with a distressed friend, or speculating on his misfortunes or his generosity."

After this statement, well might you exclaim, "Shame upon any one who will say that money should have purchased, what friendship had no right gratuitously to bestow." Yet it was for thus appearing as a volunteer, as it was said, that he was so bitterly assailed. The skeleton of his speech, which has since been published, had not then made its appearance. It was not on account of his course of argument, his treatment of the witnesses, or any misrepresentation of evidence, that he was arraigned at the bar of public opinion ; *it was for volunteering, alone.*

When the public mind began to settle down into an approval of what you have so well and conclusively defended, it became necessary to vary the attack, and he is now assailed in the columns of your journal for professional misconduct, which "in your opinion accounts for, and in some degree justifies, the general indignation felt and expressed" against him. It cannot account for what existed long anterior to the promulgation of these new charges.

We will, however, notice the charges now made against the propriety of his professional conduct, and if we are.

mistaken, will satisfactorily show how utterly groundless each and every one of them is.

It may not be amiss to premise that the appearance of counsel in a cause to argue against each other, pre-supposes that they will take different views of the same subject. The wisdom of the law has provided this expedient for the purpose of eliciting truth. It is a part of the machinery in the administration of justice. It is the mode which the law has adopted for "troubling the waters, that they may exert their virtues." It is the most efficacious mode which has ever been devised to expose falsehood and discover truth. It is conceded that an advocate "may profess feelings which he does not feel, and may support a cause which he knows to be wrong."

Dr. Johnson, when asked by Mr. Boswell what he thought of supporting a case he knew to be bad, replied: "Sir, you do not know it to be good or bad till the Judge determines it. I have said that you are to state facts fairly, so that your thinking, or what you call knowing a cause to be bad, must be from reasoning, must be from supposing your arguments to be weak and inconclusive. But, sir, that is not enough. An argument which does not convince yourself, may convince the Judge to whom you urge it; and if it does not convince him, why, then, sir, you are wrong and he is right. It is his business to judge; and you are not to be confident in your opinion that a cause is bad, but to say all you can for your client, and then hear the judge's opinion."

If a weak and inconclusive argument is urged before either the judge or jury, it belongs to the opposite counsel to expose its fallacy, or to show its want of application. We hold that counsel is not amenable to public censure for erroneous deductions, wrong inferences or false reasoning.

Your first charge is, that the admission of Robert J. Ward, Jr., as a witness, who was jointly indicted with the defendant, was a gross departure from the plainest principles of law, and that the responsibility rests between Mr. Crittenden who urged, and the judge who allowed it." The judge, upon full argument, before the occurrence of this case, had decided this question the same way. Many of the other judges of the State had given similar decisions. Now, admitting that the decision was wrong, we put it to the candor of every impartial mind to say, if Mr. Crittenden would not have failed in the discharge of his duty to his client, if he had not argued the admissibility of

this evidence, and left it to the judge to decide. But we hold that the decision was right, notwithstanding the broad assertion that no lawyer can have a doubt on the point, and that it was in strict accordance with the long established course of adjudication in the State of Kentucky. It may be that in England, and perhaps in Massachusetts, the point is differently settled; but it will be remembered, that according to the common law, no prisoner accused of a capital crime was allowed to exculpate himself by the testimony of *any* witness. Blackstone says, that the courts grew so heartily ashamed of a doctrine so unreasonable and oppressive, that a practice was gradually introduced of examining witnesses for the prisoner, but not upon oath, the consequence of which still was that the jury gave less credit to the prisoner's evidence than to that produced by the crown. At length by the statutes of 7 Wm. 3, and 1 Ann, all witnesses for the prisoner were to be examined upon oath, in like manner as the witnesses against him. Accomplices, in England, even after this change, might be examined for the crown, but not for the defendant. Although these statutes of 7 Wm. 3, and 1 Ann were never adopted in Kentucky, our courts, governed as they have been by the genius and spirit of our institutions, have never hesitated to admit witnesses to testify upon oath in behalf of the defendant, and as an accomplice jointly indicted could testify for the Commonwealth, in the same liberal spirit he was also held competent for the defendant, *when not jointly tried with him*. It is conceded on all hands, where there are separate indictments, that an accomplice is a competent witness for the defendant. Our courts have decided that his competency cannot depend upon the will of the attorney for the Commonwealth in drawing up a separate or joint indictment. These decisions have been rendered by Circuit Courts, it is true, as there has been no appeal in criminal cases until very recently, in Kentucky.

It is possible, though we know of no case, that there has not been perfect uniformity with all our Circuit Courts upon this point; but it was shown in the argument of this case that such had been the current of decisions, and Judge Kincheloe, when first deciding it, did it upon the authority of a decision of his predecessor. The State of Virginia has by statutory enactment provided "that no person who is not jointly tried with the defendant, shall be incompetent to testify in any prosecution by reason of interest in

the subject matter thereof." Greenleaf, in his *Treatise on Evidence*, § 379, says: "It is a settled rule of evidence, that a *particeps criminis* is not on that account an incompetent witness, so long as he remains not convicted and sentenced for an infamous crime. The admission of accomplices, as witnesses for the government, is justified by the necessity of the case. The usual course is to leave out of the indictment those who are to be called as witnesses; but it makes no difference as to the admissibility of an accomplice, whether he is indicted or not, *if he has not been put on his trial at the same time with his companions in crime. He is also a competent witness in their favor.*" Notwithstanding all this you undertake to decide that this ruling is so gross a perversion of Kentucky law, as in some degree to justify the indignation felt and expressed against Mr. Crittenden. We trust that your sense of justice will induce you to retract this harsh sentence.

In this connection, we are constrained to add that you have admitted a sentence, doubtless inadvertently, which if we understand its meaning, is as disgraceful to the columns of your Journal, as it is grossly false. You say, "Perhaps the counsel understood the court as well as they understood the inclination of the jury, and hence a ruling disgraceful, even to a court of *Kentucky Justice.*"

If by this the idea is intended to be conveyed that there was any understanding between the counsel and the court, or that the counsel knew any thing more of the inclination of the jury than could be ascertained by a legal interrogation, we pronounce the insinuation infamously false. But we cannot for a moment believe, that distant as you are from the scene of action, and ignorant, as you must be, of the character of those thus implicated, that you could yourselves have written the paragraph. From this consideration, we refrain from all comment upon the illiberal remark "that the ruling was disgraceful *even* to a court of *Kentucky Justice.*" We are sure that on reading over the whole paragraph, you will blush that it has polluted your pages.

You say that an unjustifiable use was made of the testimony of Robert J. Ward, Jr., thus illegally introduced; how, or in what way, you do not say, except by arguing that he was not worthy of the slightest credence, where he was not amply confirmed. You admit that it was fair

enough to urge, especially in a desperate case, that this witness, testifying under so strong a bias, is nevertheless the only one worthy of belief. In making this admission you yield the whole question, as to the unjustifiable use made of this testimony. It does seem to us, that it is among the strange and extraordinary perversities of human nature, that any properly constituted mind should come to such a conclusion, and that it should find a place in one of the most respectable Law Journals of the country. Let us look at the case as it really stood. The court admitted the testimony of young Ward, who stated clearly and distinctly that Butler struck first. He was before the jury, whose province it was to judge from his manner, his look, his tone of voice even, how far he was entitled to credit. It is true, as you say, that "he testified under the strongest temptation which can assail the integrity of a witness." We admit that in such a case, to entitle him to full credence, his statements ought to be corroborated. The consistency of his story, the filling up of chasms, which all could discern in the testimony of others, connected with his whole manner, in many cases, may amount to sufficient corroboration to carry conviction to the minds of an intelligent and honest jury. In this case, counsel had not to rely on this alone; Robert J. Ward, Sr., in his testimony, said, he "heard his wife scream; he run in, saw Matt. put his hand to his face and say, would you have me beaten like a dog. This called his attention to a blow on his face, it was swollen." This was immediately after the fatal occurrence. Mrs. Ward says: "When they returned I noticed the mark on Matt's cheek; it was red under the eye." George D. Prentice says: "Saw Matt. Ward five hours after the difficulty — my attention was called to his face and eye, which were reddened and slightly colored. I should not infer a severe blow, but one sufficient to cause injury." It thus appears that a blow had been struck. Dr. L. P. Yandell, who testifies affirmatively, and whose word no one can or would doubt, says: "Butler said, we were clinched — said Ward had called him a d—d liar, and raised his hand to strike him; then Butler struck — they clinched and he was immediately shot. Do not remember what Butler said, distinctly, about Ward raising his hand." This was a witness introduced by the prosecution, and the whole of this evidence is extracted from the report of the trial published by the *Courier and Democrat* in Kentucky, and is not taken from, what you

are pleased to term, the *ex parte report*. In addition to this, J. M. Barlow who has come in for a full share of public denunciation, says, Butler told him that Matt. Ward gave him the d—d lie, "and I hit him (or as he was a learned man, I suppose he said struck him) for it; and in the fuss Ward threw his right hand against my breast and shot me; the pistol stuck in my coat and I pulled it out."

Mr. and Mrs. Creushaw corroborate Barlow by saying that he told them, immediately after this affair, what Butler had said corresponding with the foregoing statement. He was at that time much excited against Matt. Ward. It thus appears that the statement of Robert J. Ward, Jr., was corroborated, first, by the fact of the evidence of the blow on the face; secondly, by Butler's own statement to Dr. Yandell that he struck first, a witness altogether unimpeachable, and introduced by the prosecution; and thirdly, by the testimony of Barlow, corroborated as it is, by the proof of his statements to the same effect, at the date of the occurrence. Besides all this, J. M. Allen, who lived in Yazoo city, Mississippi, and who was in Louisville at the time of the occurrence, and was sitting in the office of the Hydropathic institution, when Mr. Sturgus entered the door and said, run for a doctor, for Butler is shot and perhaps killed, stated, "that he passed on to the school-house; in the front yard there were twelve or fifteen boys. Witness asked how this happened." "Several of the boys spoke up at once, and said, Ward came there and cursed Butler, Butler struck him, and Ward shot Butler."

J. G. Gudgel, who lived in Missouri, was in company with Mr. Allen at the school-house, and inquired what had happened. "The answer given by five or six was, that Ward came to ask an explanation, Butler ordered him out of the house, Ward still asked for an explanation; Butler then struck him, as some said; others said Butler pushed him down, or partly down, and as he raised he fired; they all said Butler struck first." All this evidence, as we have before said, is extracted from the Cole report, published in Louisville. Now if from all the facts and circumstances thus detailed, an advocate for the accused had failed to urge before the jury, the truth of the statement of R. J. Ward, Jr., that Butler struck first, he would most certainly have failed in the discharge of a high and solemn duty.

We seriously ask if there is an advocate of any standing in the United States, who would come to the conclu-

sion, under this state of case, that an unjustifiable use was made of the testimony of R. J. Ward, Jr.? What if there was contradictory evidence? Did that lessen the obligation of an advocate to urge upon the jury testimony thus corroborated? One would judge from the tone of the article in your journal, that it was the duty of an honest and upright advocate himself, to *weigh* the testimony, and then to state to the jury in whose favor it preponderated. The well known principle, so universally settled as to have become a maxim of law, that the jury cannot in criminal, as in civil cases, *weigh* the evidence and decide according to its preponderance, seems to have been forgotten, and counsel is censured for not doing what a jury even would not be at liberty to do. Greenleaf, in his third volume of Evidence, § 29, after clearly defining the law on this point, adds, that "The oath administered to the jurors, according to common law, is in accordance with this distinction." After first condemning Mr. Crittenden for the unjustifiable use of young Ward's testimony, and then admitting that it may be fair enough, especially in a desperate case to urge that this witness was the only one *worthy of belief*, you add: "But the testimony of the scholars must still be disposed of; it would be a little too audacious, for even the most unscrupulous of the prisoner's counsel, to denounce them all as perjured, as they were the sons of some of the most respectable citizens of Louisville." No counsel in the case ever contended that R. J. Ward, Jr., was the only witness *worthy of belief*, and such a statement cannot be otherwise viewed than as evidence of the prejudice which dictated your whole article.

Mr. Crittenden, as he had a right to do, and as it was his *duty* as an advocate to do, commented upon the consistency of his whole statement, contending that it was the only testimony which brought order out of disorder; "the only consistent history of the events that transpired — natural in their course, and leading directly to the results that actually occurred." He does not say that he is the only witness *worthy of belief*; nor was there any disposition, as very illiberally insinuated above, "to denounce all the scholars as perjured." On the contrary, Mr. Crittenden emphatically declared his belief to the jury that these boys were "intelligent, and honest, and high-minded, and *incapable* of any intentional misrepresentation." You admit that in some respects their testimony was "undeni-

ably conflicting ; hardly one of them attempted to give the whole conversation ; they testified in regard to conversations only partly heard, and acts only partly seen." It was the duty of the counsel, however pure may have been the source from whence such testimony flowed, to make becoming and proper comments upon it ; Mr. Crittenden therefore said, and properly said, "I may safely say that from beginning to end, no two of these witnesses have perfectly agreed ; that their statements contained numerous discrepancies and contradictions ; that the account of no one of them is probable and satisfactory, and that they all show, from their disjointed nature, they only contain portions and fragments of the facts that occurred."

He very properly alluded to the fact that all their sympathies were on the side of their teacher. If it was not the province of counsel to make such comments as these, it is not perceived what he *could* say, except to admit the guilt of the client. You say that "almost every boy who testified, distinctly asserted that when Ward entered the school-room, he had *his right hand in his pocket*, and gesticulated with the fingers of his left. They corroborate each other in this important fact, with remarkable unanimity," and that Robert J. Ward, Jr., distinctly asserted to the contrary. It was necessary, therefore, for counsel in the defence to comment upon this "important fact ;" and the course which they felt it their duty to pursue, has called forth your most unqualified and bitterest denunciation.

This denunciation is based on what you call the atrocious attack of counsel on Sturgus, who you say was represented by them to be "moved by demoniac hatred towards the whole Ward family," to advise Butler to refuse the explanation, and then to instil into the minds of his pupils by artful "insinuation, and cunningly contrived observations, the belief that the fact they testified to was true, *he himself all the while knowing it to be false.*" However severe and improper the attack upon Sturgus may have been, the above is a false representation of its character. Counsel nowhere said he was moved by "demoniac hatred to the *whole* Ward family." In a different connection, he was spoken of as the enemy of Matt. Ward. In this connection, when speaking of his administering a whipping to the boy, on a former occasion, the question is asked, "If it is not probable, that instigated by *his enmity* towards the Wards, he advised Butler to refuse all explanation and in-

vestigation?" He nowhere charges him with making "insinuations and cunningly contrived observations, *he all the while knowing them to be false.*"

We have no disposition to injure the character, or even wound the feelings of Mr. Sturgus. He may be as upright and as pure a man as any in our midst, but we ask if he did not stand in a relation to this case, which fully justified the counsel in bringing his name before the jury, although he did not actually testify in the case. It was well known that not one word was said on the examining trial by any witness as to the manner in which Matt. Ward held his right hand. The evidence on that trial is now before us, as reported in the *Courier* of Nov. 4th, 1853, and this "important fact" is wholly omitted. It is equally well known that Mr. Sturgus gave his testimony on that trial. He was the assistant of Mr. Butler, doubtless much attached to him, and every feeling of his heart must naturally, and necessarily have been on his side.

"These boys, from eleven to eighteen years of age, since the occurrence of the principal fact, had been the scholars, and under the tuition and training of Mr. Sturgus." Every circumstance, by which they were surrounded, was calculated to give their minds a bias against the accused, and on the side of their teacher. Mr. Sturgus went to the place of trial with these boys; he was actually sworn as a witness for the prosecution, and never called up and examined. Is it reasonable to suppose that after this event, when these boys who were to be witnesses on the final trial, and some of whom had testified on the examining trial, were daily with Mr. Sturgus, for a period of six months, that the facts attending the transaction were never talked about? Is any thing more natural than that this event should have been the subject of frequent and repeated conversations? Without imputing dishonesty to either the scholars or Sturgus, was it not the duty of an advocate to array these facts and circumstances; and alluding to the enmity of Sturgus to Matt. Ward, to call upon the jury to put the facts together, and draw their own inferences? When it had been made manifest by the evidence of Allen and Gudgel that several of the boys of the school, immediately after the occurrence, said that "Butler struck Ward, and he shot him," had not the most scrupulous counsel who ever appeared in defence of one charged with crime, the right to argue that some extraneous influence had

operated on the recollection of the boys? This theory does not necessarily involve the turpitude of either the witnesses who testify, or of the person who may exert the extraneous influence. Sturgus may honestly "by a word thrown in, or a statement repeated," have exercised "influence over the recollection of the boys." To make out a case against Mr. Crittenden, your article has to add, to what he did say, "that he, Sturgus, himself all the while knew his statement to be false."

The following quotation from your Journal, Vol. 9, p. 243, is not an inapt illustration of the view above presented. "It is a matter of curious observation, how any event, which is shared, or witnessed merely, in a state of hurry and excitement, presents different or even opposite aspects to the memory, and *how a bias, from some almost or wholly imperceptible cause*, converts spectators who are without interest, and above suspicion, into partisan witnesses. Such is almost every case of litigated collision, by land or water, in which it is usual to find both bystanders and passengers differing, not only on the looser points of sobriety and speed, but on such matters of direct opposition, as on which side of the road or river each carriage or vessel was proceeding, and even on which side of a carriage or vessel, a blow was struck."

In the case of *The Propeller Genesee Chief v. Fitzhugh, &c.*, 12 Howard, 460, Chief Justice Taney, in speaking of the evidence in a case of collision, says: "And as it almost invariably happens, in cases of this kind, there is a great deal of contradictory testimony — the men belonging to one boat differing, for the most part, from those in the other." Why is this? Witnesses "without interest and above suspicion," are found arrayed on the side of the boat they happen to be on. Would it be unprofessional for an advocate to speculate on the causes which so universally produce this state of case? To allude to, and bring before the jury the natural influence, which the commander of the vessel would exert, "by a word properly thrown in, or a statement repeated," over the recollection of his passengers? Is it more improper to draw the same kind of inference as to the influence which Sturgus might have exerted over a parcel of boys, under his tuition and training, for six months after the occurrence? After the facts are fairly given, Mr. Crittenden tells the jury, that they are "to judge themselves if the probabilities, in regard to the character of the

testimony of these boys, are not all in favor of the assumption he had made."

The writer of the article in your journal seems to lose sight wholly of the influence which the relation between counsel and client is always calculated to exert. In the volume of your journal from which we have already quoted, it is very justly and appropriately said, that "The statement presented to counsel is, almost always, such as to induce a strong belief in the justice of the cause, and to enlist his feelings powerfully in its success. To one thus prepossessed, who can wonder that in the animation of the contest the first impression is deepened; and as the little chapter of life, with all its living interest, opens around him, his client's case becomes part of his own being; that his belief in its justice insensibly but inseparably blends with his natural desire to succeed; and that he hears all the arguments, and regards all the testimony against it, with the surprise, dislike, and incredulity of inveterate opinion, sharpened by zeal."

If Mr. Crittenden had in the heat and animation of the contest, even overstepped the strict bounds of professional propriety in his allusion to Sturgus, is there no extenuation growing out of the reiterated statements of his client as to Sturgus's feelings? When counsel for the prosecution alluded to the fact of William Ward not being examined, and said, "but they did not introduce him, because they dare not, as he would doubtless have proved the guilty intention,—that as much is often revealed by what a party withholds, as what is advanced," was there more impropriety in alluding to the fact that Sturgus was sworn as a witness, and yet was not examined? Was there any fact with regard to the position occupied by Sturgus, untruly presented to the jury, for them to draw improper inferences from? They certainly had the right to infer that he talked to his scholars about the killing, and about the circumstances attending it; the fact that they had been under him for six months, was known and conceded; the prosecution had introduced and had him sworn, and for reasons best known to themselves, had failed to examine him; the statement that he was the enemy of Matt. Ward, had gone before the jury as evidence; he was present, and could have disproved it if untrue, and could also have shown whether he conversed with the boys about their evidence, or not; and yet for alluding to these known and

admitted facts, and asking the jury to draw their own inferences, it is blazoned forth to the world as an *atrocious attack* on his character.

When Erskine, on the trial of Baillie, becoming heated with his subject, and growing personal on Lord Sandwich, was stopped by Lord Mansfield by the remark that Lord Sandwich was not before the court, he replied: "I know that he is not formally before the court, but for that very reason *I will bring him before the court*. He has placed these men in the front of the battle, in hopes to escape under their shelter, but I will not join in battle with them. I will drag him to light, who is the dark mover behind this scene of iniquity." Mr. Crittenden did not go as far as this, and describe Sturgus as the "*dark mover behind this scene of iniquity*." He philosophized only on the influence he could exert "by a word thrown in, or a statement repeated." It is not a necessary conclusion that there was any moral depravity in his doing this; he may honestly have exerted such influence, under a full conviction that he was in no way departing from the truth of the case, and thrown in words, and repeated statements, which he believed to be true; yet for simply discharging his duty, as we conceive it to have been, you conclude that all the past services and future expectations of Mr. Crittenden are not sufficient to avert the just indignation of the public, which the perversion of great powers to an unworthy purpose is sure to excite; and this sentence of condemnation is found in a law journal hitherto respectable, and has thus the implied indorsement of able and learned lawyers. We cannot doubt that your sense of justice will lead you to review, and correct also, this iniquitous condemnation.

The judge who presided on this trial comes in also for a full share of your condemnation and reprobation. A man of a purer or more unsullied character has never adorned the bench in any country. In saying this, we but speak the universal public sentiment of the whole district where he has presided. The upright and high-minded attorney for the Commonwealth, in this case, (Mr. Allen,) has voluntarily come forward to defend him from the rude and violent attacks of one of the Louisville papers.

You assume that it was the duty of the judge to give a charge to the jury, and then contrast what was said with a charge delivered by the excellent Chief Justice of your own Supreme Court, occupying more than two hours.

When you learn that a judge is not allowed to charge a jury, either in a *civil or criminal case*, in Kentucky, you will doubtless be ready to acknowledge the gross, and we may add "atrocious" injustice you have done Judge Kincheloe.

In the case of *Howard, &c., v. Coke, &c.*, 7 Ben Monroe, Kentucky Reports, p. 658, the question came up of the right of the judge to charge in a *civil* suit. The court say: "We do not deem it necessary to decide whether the charge, in this instance, would exceed the bounds of propriety, if a charge from the bench to the jury, on the evidence, be authorized by law. Such a right exists in England and in some of our sister States. It has never, however, been exercised in this State, and if the non-existence of a right is at all inferable from the fact that it has never been assumed or used, the custom in this State on this subject must be deemed conclusive against the existence of the right. By general consent and common understanding of what the law is, a different usage has prevailed. In *civil cases* the law is decided by the judge, the facts of the case being left exclusively to the decision of the jury, unbiassed by the influence of the court, or any judicial suggestion." "As a mere question of expediency, much may be urged on both sides. In this aspect of the question, however, it is one for legislative and not judicial action." "We have come to the conclusion the power does not exist in the judge, and cannot be exercised by him to any extent." It will be observed from the foregoing extracts, that the court has carefully confined the right of the judge to decide even the law to *civil cases*.

In the year 1821, charges were made against the official conduct of Benjamin Mills, one of the most able and learned judges which Kentucky can boast. He was arraigned before the legislature, and very ably and eloquently defended by Hon. Henry Clay. One of the charges against him was, that he had *charged* the jury on the law in a criminal case. He was acquitted by a vote of fifty-two to thirty-four, but immediately on his acquittal, Mr. Clark read and laid on the table four resolutions, the last of which was, "That in criminal cases the jury have a right to judge as well of the law as the fact." House Journal, p. 227. On this resolution the yeas and nays were taken, and the vote stood, for the resolution, sixty-eight, against it, seventeen. Sixteen of those who voted in the negative had it

entered on the journal, "that although they voted against the adoption of this resolution, they believe the law to be as declared in said resolution." Pp. 233, 236. The resolution was also passed by a large majority in the Senate, with a preamble attached, that the object of the legislature was "to preserve inviolate certain fundamental principles." Since that period, no judge in Kentucky has ever attempted to charge a jury in a criminal case, either upon the law or facts, in the sense in which a charge is here understood. Instructions upon points of law have been asked by counsel, and are given, modified, or refused by the court. Such is the law at present, under the new criminal code of Kentucky, section 226. "The court shall then, on the *motion* of either party, instruct the jury on the law applicable to the case, which shall always be given in writing."

From this brief view of what is considered the right and duty of a judge in Kentucky, you cannot fail to perceive how gross and outrageous has been the injustice done to one of the purest judges and best men who ever adorned a judicial station.

There are many other portions of your article, which, perhaps, demand a passing notice, but we have already extended our remarks too far. The sneers upon Kentucky justice we cannot believe emanate from so respectable a source as we have been taught to believe you to be. Before any impartial tribunal, we would most willingly compare Kentucky justice with that of your "own more favored State." There may be, and doubtless are, many cases where the guilty have escaped, in Kentucky; but do you pretend that you have had no such cases in Massachusetts? But Kentucky needs no defence. If "the code of honor," as you term it, has in any degree imparted an improper hue to the pure fountain of justice, with us, may not an equally deleterious influence have mingled its noxious element with you? But however polluted may be the stream of "*Kentucky justice*," we would blush to tarnish the character of any son of your renowned Commonwealth, who had sustained an unsullied and spotless integrity through a long life, and "against whom no word of reproach had ever been uttered," until acting in obedience to his own conscientious conviction of a high duty, he necessarily encountered the strong current of popular prejudice. It seems to us that it would require but a small degree of charity, when it is well known that the report of this cele-

brated case does not pretend to give either the exact words of witnesses, or of the arguments of counsel, to have been more cautious in the harsh denunciations in which you so freely indulge. If every word which has been published has not been in exact accordance with your views of professional propriety, has it never been your lot to meet with an advocate of ardent temperament and high honor, whose understanding has been occasionally the dupe of his other faculties, and, to use the language of an Irish barrister, "whose judgment in the hurry and fervor of argumentation could not escape the snares his ingenuity had weaved for others?" Have you never seen any one of the bright intellects of your own State engaged in a cause in which his feelings had become enlisted, not so much on account of his professional engagement as from the sacred ties of friendship, and as incident after incident became portrayed upon the living canvas, gradually becoming more and more interested, until the views and feelings of his client insensibly became a part of his own being, and like the celebrated Plunkett, "from the intense ardor with which he followed up each successive advantage, he finally worked himself into a conviction that all the merits of the case were on his side?" If so, you will no longer condemn such a man as John J. Crittenden upon unfounded charges of professional misconduct.

NOTES TO LEADING CRIMINAL CASES.

COMMONWEALTH v. ROGERS.¹

Insanity — Delusion — Medical Testimony.

A party indicted is not entitled to an acquittal on the ground of insanity, if, at the time of the alleged offence, he had capacity and reason sufficient to enable him to distinguish between right and wrong, and understood the nature, character and consequences of his act, and had mental powers sufficient to apply that knowledge to his own case.

Where the delusion of a party is such, that he has a real and firm belief of the existence of a fact which is wholly imaginary, and under that insane belief he does an act which would be justifiable if such fact existed, he is not responsible for such act. Nor is a party responsible for an act done under an uncontrollable impulse, which is the result of mental disease.

Where professional men, who have long been conversant with insanity in its various forms, and have had the superintendence of insane persons, attend the trial of a party who is indicted for a crime, and whose de-

fence is insanity, and hear the testimony in the case, their opinions, on the question whether the party was insane, are competent evidence, though they never personally examined the party.

A jury is authorized to find that a party, who is indicted, was insane at the time of the alleged offence, if the preponderance of the evidence is in favor of his insanity.

¹ **THE** defendant, a convict in the State Prison, at Charlestown, Mass., was indicted for the wilful murder of Charles Lincoln, the warden of the prison, on the 15th day of June, A. D. 1843, by stabbing him with a shoe-knife. The fact of killing was clearly proved, and the sole defence was insanity. The homicide took place on Thursday, and the evidence tended to show that, commencing on Monday night previous, and continuing with increasing aggravations up to some period subsequent to the warden's death, the prisoner was laboring under some powerful hallucination; that he was at times in great distress and apprehension; that he declared he heard the voices of his fellow-prisoners, confined in distant parts of the prison, and also some of the officers speaking to him, and threatening him with danger; telling him that poisonous substances were mingled in his food; that a fatal or dangerous game was playing upon him, which he could not long survive; that the warden was going to take him up to the old prison, shut him up, and keep him there till he was carried out feet first; that he expressed his fears and apprehensions at various times to different persons, during the three days prior to the homicide, and particularly and frequently stated that the warden was going to shut him up, and that if he did he should not live three days; he should be carried out feet first; and other statements of a like kind. *His predominant fear seemed to be that he was to be shut up by the warden, and the consequence would be that he should suffer instant death.* On the afternoon of the homicide the prisoner saw the warden entering the shop where he was at work, and under the influence of his delusion, which then appeared to be at its crisis, and in full possession of his mind, he probably imagined the time had come for his imprisonment in the old prison, and his consequent death; impelled by a fear of his impending danger, he rushed upon the object of his fear, and averted his own death, as he supposed, by taking the life of the warden.

¹ The following statement of the case is substituted for the reporter's abstract.

Several medical gentlemen, and superintendents of insane asylums, some of whom had, and others had not, made a personal examination of the prisoner, testified that in their opinion he was unquestionably insane.

The prisoner's counsel (George Bemis, Esq. and George Tyler Bigelow, Esq., now Mr. Justice Bigelow, of the Supreme Judicial Court of Massachusetts,) claimed upon this and the other evidence in the case, that if the jury were satisfied that *the prisoner, when he committed the homicide, was laboring under a delusion which overpowered his will, and deprived him of self-control, and the act was connected with that delusion, he was entitled to an acquittal.*

How entirely that position was sustained by the facts and the law, the verdict of acquittal and the instruction of the court to the jury furnish sufficient answer. The charge of the court was thus delivered by

SHAW, C. J.—In order to constitute a crime, a person must have intelligence and capacity enough to have a criminal intent and purpose; and if his reason and mental powers are either so deficient that he has no will, no conscience or controlling mental power, or if, through the overwhelming violence of mental disease, his intellectual power is for the time obliterated, he is not a responsible moral agent, and is not punishable for criminal acts.

But these are extremes easily distinguished, and not to be mistaken. The difficulty lies between these extremes, in the cases of partial insanity, where the mind may be clouded and weakened, but not incapable of remembering, reasoning and judging, or so perverted by insane delusion, as to act under false impressions and influences. In these cases, the rule of law, as we understand it, is this: A man is not to be excused from responsibility, if he has capacity and reason sufficient to enable him to distinguish between right and wrong,¹ as to the particular act he is then doing; a knowledge and consciousness that the act he is doing is wrong and criminal, and will subject him to punishment. In order to be responsible, he must have sufficient power of memory to recollect the relation in which he stands to others, and in which others stand to him; that the act he is doing is contrary to the plain dictates of justice and

¹ See opinion of the judges given to the House of Lords, 1 Car. & Kirw 130-136; Shelford on Lunatics, c. 12, § 1; *Dew v. Clark*, 3 Addams, 79; *Regina v. Oxford*, 9 Car. & P. 525; *Rex v. Offord*, 5 Car. & P. 163; *Regina v. Higginson*, 1 Car. & Kirw. 129; 1 Russell on Crimes, c. 1.

right, injurious to others, and a violation of the dictates of duty.

On the contrary, although he may be laboring under partial insanity, if he still understands the nature and character of his act, and its consequences; if he has a knowledge that it is wrong and criminal, and a mental power sufficient to apply that knowledge to his own case, and to know that, if he does the act, he will do wrong and receive punishment; such partial insanity is not sufficient to exempt him from responsibility for criminal acts.

If, then, it is proved, to the satisfaction of the jury, that the mind of the accused was in a diseased and unsound state, the question will be, whether the disease existed to so high a degree, that for the time being it overwhelmed the reason, conscience, and judgment, and whether the prisoner, in committing the homicide, acted from an irresistible and uncontrollable impulse. If so, then the act was not the act of a voluntary agent, but the involuntary act of the body, without the concurrence of a mind directing it.

The character of the mental disease, relied upon to excuse the accused in this case, is partial insanity, consisting of melancholy, accompanied by delusion. The conduct may be in many respects regular, the mind acute, and the conduct apparently governed by rules of propriety, and at the same time there may be insane delusion, by which the mind is perverted. The most common of these cases is that of *monomania*, when the mind broods over *one idea* and cannot be reasoned out of it. This may operate as an excuse for a criminal act in one of two modes. 1. Either the delusion is such that the person under its influence has a real and firm belief of some fact, not true in itself, but which, if it were true, would excuse his act; as where the belief is, that the party killed had an immediate design upon his life, and under that belief the insane man kills in supposed self-defence. A common instance is where he fully believes that the act he is doing is done by the immediate command of God, and he acts under the delusive but sincere belief that what he is doing is by the command of a superior power, which supersedes all human laws, and the laws of nature. 2. Or this state of delusion indicates, to an experienced person, that the mind is in a diseased state; that the known tendency of that diseased state of the mind is to break out into sudden paroxysms of violence,

venting itself in homicide or other violent acts towards friend or foe indiscriminately; so that although there were no previous indications of violence, yet the subsequent act, connecting itself with the previous symptoms and indications, will enable an experienced person to say that the outbreak was of such a character, that for the time being it must have overborne memory and reason; that the act was the result of the disease, and not of a mind capable of choosing; in short, that it was the result of uncontrollable impulse, and not of a person acted upon by motives, and governed by the will.

The questions, then, in the present case, will be these:

1. Was there such a delusion and hallucination? 2. Did the accused act under a false but sincere belief that the warden had a design to shut him up, and, under that pretext, destroy his life; and did he take this means to prevent it? 3. Are the facts of such a character, taken in connection with the opinions of the professional witnesses, as to induce the jury to believe that the accused had been laboring for several days under monomania, attended with delusion; and did this indicate such a diseased state of the mind, that the act of killing the warden was to be considered as an outbreak or paroxysm of disease, which, for the time being, overwhelmed and superseded reason and judgment, so that the accused was not an accountable agent?

If such was the case, the accused is entitled to an acquittal; otherwise, as the evidence proves beyond all doubt the fact of killing, without provocation, by the use of a deadly weapon, and attended with circumstances of violence, cruelty, and barbarity, he must undoubtedly be convicted of wilful murder.

The ordinary presumption is, that a person is of sound mind, until the contrary appears; and in order to shield one from criminal responsibility, the presumption must be rebutted by proof of the contrary, satisfactory to the jury. Such proof may arise, either out of the evidence offered by the prosecutor to establish the case against the accused, or from distinct evidence, offered on his part; in either case, it must be sufficient to establish the fact of insanity; otherwise, the presumption will stand.

The opinions of professional men on a question of this description are competent evidence, and in many cases are entitled to great consideration and respect. The rule of law, on which this proof of the opinion of witnesses, who

know nothing of the actual facts of the case, is founded, is not peculiar to medical testimony, but is a general rule, applicable to all cases, where the question is one depending on skill and science in any particular department. In general, it is the opinion of the jury which is to govern, and this is to be formed upon the proof of facts laid before them. But some questions lie beyond the scope of the observation and experience of men in general, but are quite within the observation and experience of those whose peculiar pursuits and profession have brought that class of facts frequently and habitually under their consideration. Shipmasters and seamen have peculiar means of acquiring knowledge and experience in whatever relates to seamanship and nautical skill. When, therefore, a question arises in a court of justice upon that subject, and certain facts are proved by other witnesses, a shipmaster may be asked his opinion as to the character of such facts. The same is true in regard to any question of science; because persons conversant with such science have peculiar means, from a larger and more exact observation, and long experience in such department of science, of drawing correct inferences from certain facts, either observed by themselves or testified to by other witnesses. A familiar instance of the application of this principle occurs very often in cases of homicide, when, upon certain facts being testified to by other witnesses, medical persons are asked, whether in their opinion a particular wound described would be an adequate cause, or whether such wound was, in their opinion, the actual cause of the death, in the particular case. Such question is commonly asked without objection; and the judicial proof of the fact of killing often depends wholly or mainly upon such testing of opinion. It is upon this ground, that the opinion of witnesses, who have long been conversant with insanity in its various forms, and who have had the care and superintendence of insane persons, are received as competent evidence, even though they have not had opportunity to examine the particular patient, and observe the symptoms and indications of disease, at the time of its supposed existence. It is designed to aid the judgment of the jury, in regard to the influence and effect of certain facts, which lie out of the observation and experience of persons in general. And such opinions, when they come from persons of great experience, and in whose correctness and sobriety of judgment just confidence can be

had, are of great weight, and deserve the respectful consideration of a jury. But the opinion of a medical man of small experience, or of one who has crude and visionary notions, or who has some favorite theory to support, is entitled to very little consideration. The value of such testimony will depend mainly upon the experience, fidelity and impartiality of the witness who gives it.

One caution, in regard to this point, it is proper to give. Even where the medical or other professional witnesses have attended the whole trial, and heard the testimony of the other witnesses, as to the facts and circumstances of the case, they are not to judge of the credit of the witnesses, or of the truth of the facts testified by others. It is for the jury to decide whether such facts are satisfactorily proved. And the proper question to be put to the professional witnesses is this: If the symptoms and indications testified to by other witnesses are proved, and if the jury are satisfied of the truth of them, whether, in their opinion, the party was insane, and what was the nature and character of that insanity; what state of mind did they indicate; and what they would expect would be the conduct of such a person, in any supposed circumstances. See 1 M. & Rob. 75.

In this interesting case three points are involved, which it is designed to make the subject of this note.

First. — What is such insanity as exempts from punishment.

Second. — Of the evidence competent on the issue of insanity, and especially of the *opinions* of witnesses on that subject.

Third. — The degree of proof sufficient to authorize a jury to find insanity.

Of each of these in their order. And

First. — What insanity is an excuse for crime.

It is foreign to the purpose of this note to enter into any general discussion of this terrible malady, its subtle and mysterious nature, its various causes, its growth and progress, or its manifold symptoms and manifestations. Such an examination more properly belongs to a treatise on medical jurisprudence, or to an independent and separate volume on Insanity itself. Neither is it our design to examine the correctness or propriety of the *result* of any of the interesting and important trials on record, where the defence of insanity has been set up. Juries may, and doubtless have, erred on the one side and the other, in their application of the just and true principles of the common law to individual cases as they came before them. And the apparent inconsistency of some of their recorded verdicts, essentially increases the painful uncertainty attending the administration of this perplexing branch of criminal law: But our present limits do not allow us to dwell upon either of these aspects of the subject, but simply to present a summary of the *principles of law* by which insanity is to be tested, as we can gather them from the language of courts and judges to whom has fallen the duty of expounding and explaining them.

Every reader conversant with the course of English trials, cannot fail to have observed that, notwithstanding all the fluctuations and inconsistencies of opinion among the most eminent and learned judges, their vague generalities and loose expressions, a gradual advance in accuracy, clearness, and *reason* in the law of insanity is perceptible, as laid down in modern trials, when compared with the doctrines of Lord Coke, Hale, Fitzherbert, and others, of early time. One of the most eminent of these early writers declares that "such a person as laboring under melancholy distempers, hath yet ordinarily as great understanding as ordinarily a child of fourteen hath, is such a person as may be guilty of treason or felony." 1 Hale, P. C. 30.

And even as late as 1723, we find this language used by Mr. Justice Tracy, on the trial of Arnold for shooting at Lord Onslow:

"It is not," said he, "every kind of frantic humor, or something unaccountable in a man's actions, that points him out to be such a madman as is exempted from punishment; it must be a man that is *totally* deprived of his understanding and memory, and doth not know what he is doing no more than an infant, *than a brute*, or wild beast; such a one is never the object of punishment." 8 Hargr. St. Tr. 322; 16 Ib. 764.

True it is, such an one is never the object of punishment, but if the converse is to be held true, that all others are amenable, then *absolute idiocy* is the only shield against the arm of the criminal law.

Doctrines like these could hardly be expected long to withstand the advance of scientific knowledge, and the diffusion of more accurate information concerning the existence and manifestations of a diseased and disordered mind.

The first advance from the old doctrines was, that if the accused had *so far* lost the use of his understanding as not to know right from wrong, he was not responsible. This test was afterwards so far modified, as to be applied to the *precise act* for which the prisoner was arraigned, and it has now long been the rule usually applied in the English courts, that if the accused has reason sufficient to distinguish right from wrong, in reference to his contemplated act, or, to speak more accurately, *reason sufficient to know that the act was contrary to law*, he is amenable to justice. And this test has been adhered to, with some tenacity, by the English judges. Several instances of their reported language will be found cited in this note. Lord Brougham, in the memorable debate in the House of Lords, occasioned by the acquittal of McNaughten, for murder, in 1843, thus decidedly expressed himself:

"If the perpetrator *knew what he was doing*, if he had taken the precaution to accomplish his purpose; if he knew, at the time of doing the desperate act, that it was forbidden by the law, that was *his test of sanity*; he cared not what judge gave another test; he should go to his grave in the belief that it was the real, sound, and consistent test." Sir James Mansfield, [not Lord Mansfield,] in *Bellingham's case*, 5 Carr. & Payne, 169, note, (1812,) applied this test in its most general form to a prisoner indicted for murder. "In order to support such a defence," said he, "it ought to be proved by the most distinct and unquestionable evidence, *that the prisoner was incapable of judging between right and wrong*; in fact, it must be proved beyond all doubt that at the time he committed the atrocious act with which he stood charged, he did not consider that murder was a crime against the laws of God and nature; and *that there was no other proof of insanity which would excuse murder or any other crime*; that, in the species of madness called 'lunacy, where persons are subject to temporary paroxysms, in which they are guilty of acts of extravagance, such persons committing crimes when they are not affected by the malady,

would be, to all intents and purposes, amenable to justice; and that so long as they could distinguish good from evil, they would be answerable for their conduct; and that in the species of insanity in which the patient fancies the existence of injury, and seeks an opportunity of gratifying revenge by some hostile act, *if such a person is capable in other respects of distinguishing right from wrong*, there would be no excuse for any act of atrocity which he might commit under this description of derangement." But the principles here advanced are so shocking, so contrary to one's moral sense, that it is not strange they should have been subsequently disapproved, even by Mansfield's successors.

Yet such a deep impression had the old authorities made upon the judicial mind of England, that we find Lord Lyndhurst, in 1831, expressly approving of the doctrines in *Bellingham's case*, although he furnished a much milder test to the jury in the case then before him. *Rex v. Offord*, 5 Carr. & Payne, 168. The prisoner was there indicted for murder. His defence was insanity. It appeared that he labored under the notion that the inhabitants of Hadleigh, and especially the deceased, were continually issuing warrants against his life, and he would frequently, under the same notion, abuse persons whom he met in the street, and with whom he had no dealings of any kind. In his pocket was found a list of conspirators against his life; also another paper, headed "This is the beginning of an attempt against my life." The Chief Baron told the jury that they must be satisfied, before they could acquit the prisoner on the ground of insanity, that he did not know what the effect of his act would be, if fatal, with reference to the crime of murder; and that the question was, whether he knew he was committing an offence against the laws of God and nature.

Under this evidence and these instructions the prisoner was acquitted, and with apparent good reason, for the delusion in that case was the same as in our leading case of *Commonwealth v. Rogers*, and the cases are in their facts and results very similar. The jury acted on the sound principle in *Offord's case*, although it does not seem to have been intimated to them from the bench. How much clearer and more satisfactory a guide was given to the jury for their examination of this delicate, subtle, and mysterious subject, in *Rogers' case* than in *Offord's*. So great was the advance in correct understanding of the law of insanity in the short space of twelve years.

Bowler's case, before Justice Le Blanc, in 1811, furnishes another painful illustration of the application of this loose test of legal insanity. The court there told the jury "it was for them to determine whether the prisoner, when he committed the offence, *was capable of distinguishing between right and wrong*, or under the influence of any illusion in respect to the prosecutor, which rendered his mind at the moment insensible of the nature of the act he was about to commit; since in that case, he would not be legally responsible for his conduct. On the other hand, provided, when he committed the offence, he was capable of distinguishing right from wrong, and not under the influence of such an illusion as disabled him from discovering that he was doing a wrong act, he would be answerable to the justice of the country, and guilty in the eye of the law." *Lord Ferrers' case*, before the House of Lords, in 19 How. St. T. 886, adopts the same test as *Bowler's case*.

The power of distinguishing right from wrong was again made the test of insanity, in *Regina v. Higginson*, 1 Car. & Kir. 129, (1843,) before Maule, J., who said to the jury:—"If you are satisfied that the prisoner, at the time of committing the offence, was so insane *that he did not know right from wrong*, he should be acquitted on that ground. But if you think he did know right from wrong, he is responsible for his acts, although of weak intellect."

TINDAL, C. J., uses similar language in *Regina v. Vaughan*, 1 Cox, C. C. 80, (1844,) where he informed the jury that "it was not mere eccentricity or singularity of manner, that will suffice to establish the plea of insanity; it must be shown that the prisoner had no competent use of his understanding, so as to know that he was doing a wrong thing in the particular act in question." This is much better than the preceding, since it is confined to the act in question. Lord DENMAN, at the trial of Oxford for shooting at the queen, in 1841, said: "If you think that the prisoner was, at the time, laboring under any delusion which prevented him from judging of the effects of the act he had committed, you cannot find him guilty. But, if, though laboring under a delusion, he fired the loaded pistols at the queen, knowing the possible result, though forced to the act by his morbid love of notoriety, he is responsible, and liable to punishment."

So in the more recent case of *Regina v. Stokes*, 3 Car. & Kir. 185, (1848,) ROLFE, B., told the jury that "every man is held responsible for his acts by the law of his country, if he can discern right from wrong. This subject was, a few years ago, carefully considered by all the judges, and the law is clear upon the subject. It is true that learned speculators, in their writings, have laid it down, that men with a consciousness that they were doing wrong, were irresistibly impelled to commit some unlawful act. But who enabled them to dive into the human heart, and see the real motive that prompted the commission of such deeds. It has been urged that no motive has been shown for the commission of this crime; but it is a dangerous ground to take to say that a man must be insane, because men fail to discern the motive for his act." See also *Regina v. Layton*, 4 Cox, C. C. 149, (1849,) to the same effect.

So in *Regina v. Allnut*, before the same eminent Judge in 1848, a boy twelve years of age, was convicted of poisoning his grandfather under circumstances, showing great contrivance and deliberation. The defence was that the act was done under an irresistible impulse, which amounted to insanity. The jury were told: "The witnesses called for the defence described the prisoner as acting from uncontrollable impulse, and they made other statements, of the value of which it would be for the jury to decide; but he must say that it was his opinion that such evidence ought to be scanned by juries with very great jealousy and suspicion, because it might tend to perfect justification of every crime that was committed. What was the meaning of not being able to resist moral influence? Every crime was committed under an influence of such a description, and the object of the law was to compel persons to control these influences; and if it was made an excuse for a person who had committed a crime, that he had been goaded to it by some impulse, which medical men might choose to say he could not control, he must observe that such a doctrine would be fraught with very great danger to society."

And PARKE, Baron, seems to have had this case in his mind in the subsequent case of *Regina v. Barton*, 3 Cox, C. C. 375, (1848,) where the prisoner was indicted for the murder of his wife by cutting her throat with a razor. The distinguished Judge told the jury: "There was but one question for their consideration, viz., whether at the time the prisoner inflicted the wounds which caused the death of his wife, he was in a state of mind to be made responsible to the law for her murder. That would depend upon the question whether he, at the time, knew the nature and character of the deed he was committing, and if so, whether he knew he was doing wrong in so acting. This mode of dealing with the defence of insanity had not, he was aware, the concurrence of medical men; but he must, nevertheless, express his

decided concurrence with Mr. Baron ROLFE's views of such cases; that learned judge having expressed his opinion to be that the excuse of an irresistible impulse, co-existing with the full possession of reasoning powers, might be urged in justification of every crime known to the law; for every man might be said, and truly, not to commit any crime except under influence of some irresistible impulse. *Something more than this was necessary to justify an acquittal on the ground of insanity*, and it would be therefore for the jury to say whether, taking into consideration all that the surgeon had said, which was entitled to great weight, the impulse under which the prisoner had committed this deed was one which altogether deprived him of knowledge that he was doing wrong.

So in *Regina v. Pate*, before Baron ALDERSON, in 1850, for an assault upon the queen, the species of insanity relied upon was, that of an uncontrollable impulse driving the prisoner on against his will, to commit the offence. The medical gentlemen expressed a decided opinion that the prisoner was insane and not responsible, but the learned judge said, in summing up: "It is not because a man is insane that he is unpunishable; and I must say, that upon this point there exists a very grievous delusion in the minds of medical men. The only insanity which excuses a man for his acts, is that species of delusion, which conduced to, and drove him to commit the act alleged against him. The jury ought to have clear proof of a formed disease of the mind, a disease existing before the act was committed, and which made the accused incapable of knowing at the time that it was a wrong act for him to do. The law does not acknowledge the doctrine of an uncontrollable impulse, if the person was aware it was a wrong act he was about to commit. A man might say he picked a pocket from some uncontrollable impulse, and in that case the law would have an uncontrollable impulse to punish him for it. The question you have to decide is, Are you satisfied that at the time he was suffering from a disease of the mind which rendered him incapable of judging whether the act he committed was a right or wrong act? If you are not satisfied of this fact, you must say that he is guilty!"

The English formula, already so often repeated, was applied in *State v. Spencer*, 1 Zabriskie, 196, (1846,) where C. J. HORNBLOWER said to the jury: "The simple question for you, is whether the accused at the time of doing the act was conscious that it was an act he ought not to do. If he was conscious of this, he cannot be excused on the score of insanity, he is amenable to the law."

The same test of legal responsibility was deliberately pronounced by the judges of England, after great and anxious deliberation, upon questions put to them by the house of lords, after the trial of *McNaughten*, 10 Clark & Finnelly, 200, one of the most striking and important cases concerning insanity on record.

"The first question was: 'What is the law respecting alleged crimes committed by persons afflicted with insane delusion, in respect to one or more particular subjects or persons; as, for instance, where, at the time of the commission of the alleged crime, the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some supposed public benefit?' To which the judges answered, assuming that such inquiries are confined to those persons who labor under such partial delusions only, and are not in other respects insane, 'we are of opinion, that, notwithstanding the party accused did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable, according to

the nature of the crime committed, *if he knew at the time of committing such crime, that he was acting contrary to law*, which expression we understand, to mean the law of the land.' The second inquiry was: 'What are the proper questions to be submitted to the jury, where a person alleged to be afflicted with insane delusion, respecting one or more particular subjects or persons is charged with the commission of a crime, (murder, for example,) and insanity is set up as a defence?' And, thirdly: 'In what terms ought the questions to be left to the jury as to the prisoner's state of mind at the time when the act was committed?' To both of these interrogatories it was answered that the jury ought to be told in all cases 'that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that, to establish a defence on the ground of insanity it must be clearly proved, that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it, *that he did not know that he was doing that which is wrong.*' The mode of putting the latter part of the question to the jury on these occasions, has generally been, whether the accused at the time of doing the act knew the difference between right and wrong; which mode, though rarely, if ever, leading to any mistake with the jury, is not so accurate when put generally, and in the abstract, as when put with reference to the party's knowledge of right and wrong, in respect to the very act with which he is charged. If the question were to be put as to the knowledge of the accused, solely and exclusively with reference to the law of the land, it might tend to confound the jury, by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to a conviction; whereas the law is administered upon the principle that every one must be taken conclusively to know it, without proof, that he does know it. If the accused was conscious that the act was one which he ought not to do, and if the act was at the same time contrary to the law of the land, he is punishable; *and the usual course, therefore, has been, to leave the question to the jury; whether the party accused had a sufficient degree of reason to know that he was doing an act that was wrong;* and this course we think is correct, accompanied with such observations and explanations as the circumstances of each particular case may require."

This subject was much discussed in *Freeman v. The People*, 4 Denio, 29, (1847.) The rule of *McNaughten's case* was there cited with approbation, especial care being taken to confine the inquiry to the person's capacity of distinguishing right from wrong as to the particular act charged; for while a person might have a very just perception of the moral qualities of most actions, he might at the same time be as to some particular act absolutely insane, and consequently incapable as to *that* of judging accurately between right and wrong. And we see not why the converse may not be equally true, viz.: that a person may be generally insane, and be incapable of distinguishing right from wrong in a majority of his actions, and yet retain clear perceptions of some of his duties, and obligations, and realize that a certain specified violation thereof, should render him amenable to punishment. It was, therefore, denied that sanity, and a *general* capacity to distinguish between right and wrong were convertible terms, and this we understand to be the rule of the modern English authorities, meaning by *right* and *wrong* as used in the foregoing cases, not right or wrong in a moral sense purely, but rather in a legal one. Lord BROUGHAM, in the debate on *McNaughten's case* declared, that "Knowing right from wrong; knowing he sinned against the law of God and nature; knowing the act to

be forbidden by the law of the country was vague and indefinite." The true test was this: "was he capable of distinguishing right from wrong; *that is, right according to the law*; wrong, an act condemned and punishable by the law!"

We may therefore conclude, that incapacity of perceiving that the act was contrary to law, is in all cases sufficient evidence of insanity.

But is that the only test? Is the existence of such capacity, equally a test of sanity? Our leading case justifies us in claiming an additional test of insanity, viz.: *delusion*, or the fixed belief of the mind in the existence of things as realities, which have no existence but in the brain of the madman. *Hadfield's case*, before Lord KENYON, in 1800, is a striking illustration. It was proved that he had been a private soldier in a dragoon regiment, in the year 1793, received many severe wounds in battle, near Lisle, which had caused partial derangement of mind, and he had been dismissed from the army on account of insanity. Since his return to England he had been annually out of his mind, from the beginning of spring to the end of the dog days, and had been under confinement as a lunatic. When affected by his disorder, he imagined himself to hold intercourse with God; sometimes called himself God, or Jesus Christ, and used other expressions of the most irreligious and blasphemous kind, and also committed acts of the greatest extravagance; but at other times he appeared to be rational, and discovered no symptom of mental incapacity or disorder. On the 14th May, preceding the commission of the act in question, his mind was very much disordered, and he used many blasphemous expressions. At one or two o'clock on the following morning he suddenly jumped out of bed, and, alluding to his child, a boy of eight months old, of whom he was usually remarkably fond, said, he was about to dash his brains out against the bed-post, and that God had ordered him to do so; and, upon his wife screaming, and his friends coming in, he ran into a cupboard, and declared he would lie there, it should be his bed, and God had said so; and when doing this, having overset some water, he said he had lost a great deal of blood. On the same and the following day, he used many incoherent and blasphemous expressions. On the morning of the 15th of May, he seemed worse, said that he had seen God in the night, that the coach was waiting, and that he had been to dine with the king. He spoke very highly of the king, the royal family, and particularly of the Duke of York. He then went to his master's workshop, whence he returned to dinner at two, but said that he stood in no need of meat, and could live without it. He asked for tea between three and four o'clock, and talked of being made a member of the society of Odd Fellows; and after repeating his irreligious expressions, went out and repaired to the theatre. On the part of the crown it was proved that he had sat in his place in the theatre, nearly three quarters of an hour before the king entered; that on the moment when the audience rose on his majesty's entering his box, he got up above the rest, and presenting a pistol loaded with slugs, fired it at the king's person, and then let it drop; that when he fired his situation appeared favorable for taking aim, for he was standing upon the second seat from the orchestra, in the pit; and he took a deliberate aim, by looking down the barrel as a man usually does when taking aim. On his apprehension, amongst other expressions, he said that he knew perfectly well his life was forfeited; that he was tired of life, and regretted nothing but the fate of a woman who was his wife, and would be his wife a few days longer, he supposed. These words he spoke calmly and without any apparent derangement; and with equal calmness, repeated that he was tired of life, and said that his plan was to get rid of it by other means; he did not intend any thing against the life of the king, he knew the attempt only would answer his purpose.

The evidence for the defendant tended to show, and the memorable argument of the eloquent *ERSKINE*, was directed to convince the jury that the accused was laboring under a *sincere* and firm *delusion* that it was his duty to offer himself a sacrifice for his fellow men, to do some act by which he should be visited with the extreme penalty of the law; and the most ready way, as he conceived, to attain his object was to attempt the life of his sovereign, and thus draw upon himself that death he thought it his duty to undergo. This delusion, *ERSKINE* claimed, if the *cause* of the act complained of, rendered him irresponsible. This was a direct, and acknowledged innovation upon the law of insanity as then recognised by courts in England, and entirely inconsistent with the test of capability of distinguishing between right and wrong, already so often alluded to. For *Hadfield* *did know* right from wrong; *did know* that the act he was about to do was forbidden by the law; *did know* the nature and character of the penalty attached to murder; and more than this he was able to *calculate*, and did calculate the means necessary and proper to secure his end, and no sane man could have reasoned better in this respect than he. He made deliberate preparations to do an act, at a time and place, and in a manner, which whether successful or not, could not fail to draw upon him the fatal consequence he so much desired, and which, under an *overwhelming delusion*, he thought it his highest duty to suffer. There was unquestionably a method in his madness, but he must have been a responsible being according to the rule of Lord *BROUGHAM*, before stated; yet the whole facts and searching analysis of *ERSKINE* probably convinced all who heard it, that it would be a violation of law and of humanity to hold the accused accountable for the consequence of his delusion. And Lord *KENYON*, himself, after listening to the new position of the prisoner's counsel concurred in its wisdom, justice and truth, and advised the withdrawal of the prosecution.

Martin's case, for firing the Cathedral at York, is familiar to our readers. The insanity there relied upon was, as in *Hadfield's case*, delusion. He admitted he knew the act to be wrong, i. e. contrary to the law of the land, but he was laboring under the delusion, that he was commanded by a voice from heaven to burn the church on account of the sins of the clergy. He knew the nature of the act, and that it was punishable by law, since, when accused of having stolen the golden fringe, and other ornaments of the choir, he declared he did not wish to steal any thing, but kept them to furnish proof that he alone had committed the act, in obedience to his heavenly commission, so that no other person might bear the punishment. He also was acquitted; but if knowledge of right and wrong, or what is allowed and what is forbidden by law be the sole test of insanity, he was clearly responsible.

Another instance occurred in 1844, at the Central Criminal Court, *Regina v. Ross Touchett*, which illustrates the presence of insanity at the same time with the most perfect consciousness, that the act contemplated was forbidden by the law. The prisoner entered a shooting gallery, took a pistol and deliberately fired at the proprietor of the gallery, while his back was turned, and inflicted a wound which resulted in death. After firing his pistol, he said he did it on purpose, *for he wished to be hanged!* that he had no knowledge of the person he shot, but that he wished to be hung, and had brooded over suicide for some years. He referred to a case of a man who had just then been executed for shooting a man at Brighton, and said he wished to do something of the same kind, as he wished to be hung. Yet he was acquitted on the score of insanity. If knowing that his act was forbidden by the law constituted him sane, he was unjustly acquitted.

So in the next year, the case of *Regina v. Brixey*, at the Central Criminal Court, June, 1845. The prisoner was a quiet, inoffensive girl, a maid servant in a respectable family. She labored under a disordered menstruation, and had shown some unusual violence of temper a short time before. One day she procured a knife from the kitchen on some false pretence, and while the nurse was out of the room, cut the throat of her master's infant child. She then went down stairs and told her master what she had done, was perfectly conscious of the crime she had committed, and expressed much anxiety to know whether she would be hanged, or only transported. She was acquitted as insane, and as having done the deed under some delusion or irresistible impulse, probably caused by her obstructed menstruation. Delusion, too, was the phase of insanity relied upon in *Oxford's case*, who shot at the queen; believing it necessary, in order to accomplish some great public benefit.

McNaughten's case, in 1843, before referred to, furnishes another illustration of the same phase of insanity, namely, delusion or hallucination. The defendant was a Scotchman, and shot Mr. Drummond, the private secretary of Sir Robert Peel, in the streets of London, evidently mistaking him for Sir Robert himself. The act was done under circumstances showing great deliberation, coolness, and possession of intellectual powers. The defence was, that the prisoner was laboring under an insane delusion that he was the victim of some indefinite, mysterious, and incessant persecution; that he was every where followed by enemies, blasting his fame, disturbing his peace, accusing him of crimes, and filling him with intolerable inquietude. And believing Sir Robert Peel to be one of his persecutors, he resolved to sacrifice him. The fact of the existence of the delusion was supported by strong medical testimony; so strong, indeed, that TINDAL, Chief Justice, having inquired of Sir William Follett, conducting the prosecution, if he could control the testimony for the defence, thought it to be his duty to stop the case, and it was submitted without argument. The prisoner was acquitted, which gave rise to much discussion both in and out of the House of Lords, and led to the authoritative announcement of the law by all the judges before given. Whether the acquittal of *McNaughten* was consistent with the principles then laid down, especially in the answer to the first question, we leave our readers to judge; but that he was in fact insane, became afterwards clear to all.

Delusion, illusion, or hallucination, where there is no frenzy or raving madness, has also been declared to be the true legal test of insanity in the Ecclesiastical Courts. *Dew v. Clark*, 3 Addams, 79; *Frere v. Peacocke*, 1 Robertson, 442, a very excellent case on this subject. Our leading case, therefore, is well sustained, both on principle and authority. Indeed it is directly supported by the fourth answer of the judges in *McNaughten's case*, which, with the question, were as follow:

"If a person under an insane delusion as to existing facts commits an offence in consequence thereof, is he thereby excused?" To which the Judges said, "the answer must depend upon the nature of the delusion; but, making the same assumption as we did before, namely, that he labors under such partial delusion only, and is not in other respects insane, we think he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if, under the influence of his delusion, he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment."

This subject was ably examined by Nisbit, J., in *Roberts v. The State*, 3 Georgia, 310, (1847,) where the general rule that if a person has reason sufficient to distinguish between right and wrong in relation to the particular act to be committed, he is criminally responsible, was admitted to have this exception, that although the prisoner had such reason, yet if the act was done in consequence of some delusion which overpowered his will, and there was no criminal intent, he is not punishable, and the law of *Commonwealth v. Rogers* and *Hadfield's case* was expressly approved. The rule in Massachusetts was also approved in New York, in 1848, in *The People v. Pine*, 2 Barb. 571, where Barculo, J., says: — "There are cases in which the insanity consists in a delusion by which the prisoner has a real and firm belief in the existence of a fact wholly imaginary and unfounded. In regard to this, the English courts hold that it is no defence for a crime that the prisoner supposes he is redressing an injury or grievance. The Massachusetts rule is, that if the imaginary facts would justify the act, if true, then he is excusable: as when the prisoner supposed that the person was about to kill him, and he slays the other in self-defence. There must be an immediate apprehension of danger."

Numerous instances are on record, which sufficiently prove that persons really insane, may, and do commit acts, of the criminality of which they were at the time perfectly conscious. Indeed those who have had the care of lunatics tell us that they have heard undoubted lunatics boast that they could not be hung for the crime of murder, and that their insanity exempted them from punishment for violation of the law. When one really insane murders another in order to receive the punishment of death at the hands of the law, as in *Hadfield's case*, or commits a twofold murder, with the express declaration that he may as well suffer for both as for one, as in *Greensmith's case*, Midland Circuit, July, 1837, it is apparent that a capacity of distinguishing between what is allowed and what is forbidden by the law is not always conclusive evidence of sanity. Either all those persons who have been acquitted on the ground of insanity, when there was evidence of such knowledge, have been illegally acquitted, and justice has been sacrificed, or else the test of insanity so often laid down is an imperfect test.

Delusion, therefore, seems to be an equally sound and safe test of insanity, in many cases, as incapacity of knowing right from wrong. But this delusion ought to be so great in its extent and degree as to blind the person to his moral duty, in fact controlling his will, and rendering the commission of the act, in his view, a duty of overruling necessity. The act charged against him must also have been the direct result of his delusion; and to free him from responsibility, the delusion must have been directly connected with the act, driving him to its commission. An excellent illustration of this species of insanity is that perverted sense of religious obligation which causes men oftentimes to sacrifice their wives and children.

The two tests already named may, and often do, coexist in the same mind. In *Commonwealth v. Rogers*, the prisoner labored under a delusion, but which, at the same time, clouded his capacity of distinguishing right from wrong, and led him to believe that the act he contemplated was not wrong, either morally or legally, as indeed it would not have been, had the delusion been well founded in fact.

But will these two tests suffice? We defer the consideration of them to a future number.

E. H. B.

Recent American Decisions.

*Superior Court of New Hampshire, Strafford, ss., July
Term, 1852.*

WOODMAN v. HUBBARD.¹

Contracts on Sunday—Trover for the conversion of a horse hired on Sunday.

If the owner of a horse let him to be driven to one place, and the hirer voluntarily drives him beyond that place to another, this is a conversion of the horse, for which the owner may maintain trover against the hirer.

It is no defence to such an action that the horse was let on a Sunday, in violation of the statute for the observance of that day.

CASE. The action was tried upon the general issue. The first count in the declaration alleged that the plaintiff, on the 1st day of September, 1850, delivered to the defendant his, the plaintiff's, horse, to ride from the Great Falls Village in Somersworth, in this county, to South Berwick Village, in the State of Maine, and back again, and that the defendant so unreasonably and immoderately overloaded, drove and rode said horse that by reason thereof he died.

The second count was in trover for an alleged conversion of the horse, on the 1st day of September, 1850.

Upon the trial, it appeared in evidence that on the 1st day of September, 1850, which was Sunday, the defendant hired the plaintiff's horse to go from the Great Falls Village in Somersworth, to South Berwick Village, and agreed to pay a stipulated price therefor; that the defendant drove the horse to South Berwick Village on the morning of that day, and from thence to another place some miles beyond; that he returned with the horse to Great Falls Village on the evening of the same day, and re-delivered the horse to the plaintiff, and that soon afterwards the horse sickened, and in the course of the next day died.

There was evidence in the case tending to show that the death of the horse was occasioned by the unreasonable and immoderate driving of the defendant.

¹ 5 Foster (N. H.) 67, (in press.) By the kindness of the Reporter and Publisher we are enabled to furnish, in advance of publication, the following interesting decision conflicting with that of the Supreme Court of Massachusetts, in the case of *Gregg v. Wyman*, 4 Cush. 322.

On the part of the defendant, it was contended that as the horse was let under a contract made on Sunday, and for the purpose of performing a service on that day, the defendant was not liable under either count in the declaration, although the jury should be satisfied that the death of the horse was occasioned by his immoderate driving. The court instructed the jury that the defendant could not be held liable under the first count in the declaration ; but that if the defendant drove the horse to a place beyond that for which he was hired, and to which a fair understanding of the meaning of the parties in making the agreement for the use of the horse, would not authorize him to drive, it was a conversion of the property of the defendant at the time of his so driving him beyond the place agreed upon, for which he would be liable under the second count ; and that a return of the property by the defendant to the plaintiff was to be considered in mitigation of the damages ; and that in considering the question of damages, they should inquire whether the driving of the horse by the defendant after such conversion, and before the return to the plaintiff, occasioned or in any way contributed to the death or injury of the horse, and if so, that they should abate so much as the value of the horse might have been reduced thereby from the sum which otherwise they would have found to be the value of the horse at his return, and if they found that the driving after the conversion contributed to the death of the horse, and that he was of no value to the plaintiff when returned, they should assess the damages at the full value of the horse at the time of the conversion.

To which rulings and instructions of the court the defendant excepted. A verdict was rendered for the plaintiff, and the defendant moved that the same be set aside and a new trial granted on account of said alleged erroneous instructions.

R. Eastman, for the plaintiff ; *Jordan* and *McCrillis*, for the defendant.

PERLEY, J. — It is a general and well established rule that no action can be maintained on a contract made in violation of law. When a contract is made on Sunday, and the making of it on that day is forbidden by the statute, the contract is void, though the thing contracted to be done may be lawful ; as in a case of a promissory note to pay money which the maker owes to the payee. And a contract made on another day to do an act in violation of the law for the observance of the Lord's day would be void.

The provision of the Revised Statutes on this subject, ch. 118, § 1, is as follows: "No person shall do any work, business or labor of his secular calling, to the disturbance of others, works of necessity and mercy excepted, on the first day of the week, commonly called the Lord's day, nor shall any person use any play, game or recreation on that day, or any part thereof."

Whether the letting of a horse on Sunday is necessarily and in all cases a work or business to the disturbance of others, and whether every ride or drive made on a Sunday for mere relaxation and exercise must be regarded as an unlawful recreation within the meaning of the statute, it is not necessary in this case to decide. The instructions of the court to the jury went upon the ground that the contract was illegal, and in this respect were sufficiently favorable to the defendant. Was the other part of the charge correct, in which the court instructed the jury that if the defendant voluntarily drove the horse to a place beyond that for which he was hired, he was liable in trover?

If the owner places his property in the hands of another to be used temporarily for an unlawful purpose, or in any unlawful way, though the contract which he makes respecting the illegal use is void, he does not forfeit his property in the thing which he has thus delivered to another on an illegal contract. Where the property is intrusted to another to be wholly devoted and appropriated to an illegal purpose, perhaps the law is different; as in the case where goods are shipped to be carried to the public enemy.

In *Dwight v. Brewster*, 1 Pick. 51, the action was case, with a count in trover for a package of bank notes delivered to the defendant to be carried from Northampton to Springfield. The court (Parker, C. J.) say: "The principal ground of defence to the action was, that by the law of the United States it was made unlawful for a carrier of the mail to take any letter or packet and deliver it to the person to whom it was sent, and that such mail carrier was made liable to a penalty for so doing; that if it was unlawful to carry, it must be unlawful to send, and that no action could be maintained for the non-performance of an undertaking that constituted an offence. The principle settled is, that a party to an unlawful contract shall not receive the aid of the law to enforce that contract, or to compensate him for the breach of it. It is not easy, however, to discern how a party to such contract, who becomes possessed

of the property of the other party, with which he is to do something which the law prohibits, can acquire a right to that property. The contract being void, the property is not changed if it remains in the hands of him to whom it was committed. If he has executed the contract with it, or it has become forfeited by judicial process, or if stolen or lost without his fault, he may defend himself against any demand of the owner in ordinary cases; but if he has it in his possession he must be liable for the value of it; and in an action of trover, with proper evidence of a conversion, the plaintiff would undoubtedly prevail." *Lewis v. Littlefield*, 15 Maine, 233, and *Phalen v. Clark*, 19 Conn. 421, are to the same point.

The same general doctrine is implied in *Frost v. Hull*, 4 N. H. 153; and we have seen no authority which tends to contradict the rule that in a case like this, though the contract may be void, the property in the thing bailed for the illegal use, remains with the former owner.

The property in the horse remained therefore in the plaintiff; and it would seem to follow as a necessary conclusion that for a direct, substantial invasion of that right, he might maintain the proper action against the defendant or a third person. In such an action he would not claim by or through the illegal contract, but would claim as the general owner of the horse, for an injury done to his right of property, which was antecedent to the contract, and not derived from it, nor defeated by it.

The action of trover is founded upon property in the plaintiff, and a conversion by the defendant. A conversion consists in an illegal control of the thing converted, inconsistent with the plaintiff's right of property. If one hire a horse to be driven to one place, and voluntarily drive him to another, it is a conversion, and trover will lie. *Wheelock v. Wheelright*, 5 Mass. 104.

This is in accordance with the law in other cases, where the bailee for one purpose diverts the thing bailed to another; as where a carrier uses, or sells, or delivers to the wrong party, the commodity which he received to transport. The circumstance that the property is in the hands of the bailee with the license of the owner to use it for one purpose, gives no right to use it for another; and the invasion of the owner's right of property is as complete; when the bailee goes beyond his license and duty, as if the control over the property were usurped without any bailment. There can

be no doubt, on the authorities, that trover would be a proper remedy in the case, if the illegality of the contract, on which the defendant took the horse into his possession, had not been set up as a defence.

If, however, though there has been in this case a technical, legal conversion, the real and substantial claim of the plaintiff is merely to recover damages for the breach of an illegal contract; if he must, notwithstanding the form of his action, claim in fact by and through his contract, he cannot evade the consequences of his illegal act by adopting a fictitious action, allowed in ordinary cases for the purposes of the remedy. In some cases the plaintiff, for convenience of his remedy, when his claim arises under a contract, is allowed to allege his gravamen in a criminal neglect of duty in the manner of performing, or in neglecting to perform, the contract. *Covett v. Radnidge*, 3 East, 62. But in such case, by varying the form of the remedy, the plaintiff cannot deprive his adversary of any defence, such as infancy, which he might have set up, if the claim had been made for a breach of the contract. *Jennings v. Randall*, 8 T. R. 335; *Green v. Greenbank*, 2 Marshall, 485, (4 C. L. 375;) *Fitts v. Hall*, 9 N. H. 441.

The question, then, becomes material whether the only real injury which the plaintiff suffered was by a breach of the contract; or whether the driving of the horse to another place was a substantial invasion of the plaintiff's right of property.

When the defendant voluntarily drove the horse beyond the limits for which he was hired, he acted wholly without right. He then took the horse into his own control, without any authority or license from the owner. The conversion was in law as complete, the wrongful invasion of the plaintiff's right of property was as absolute as if, instead of driving the horse a few miles beyond the place for which he had hired him, he had detained and used him for a year, or any other indefinite time, or had driven him to market and sold him. If taking the wrongful control of the horse, and driving him ten miles, was not a substantial conversion, how far must the defendant have driven him? How long must he have detained him? And what other and further wrongful acts was it necessary that he should do, in order to make himself a substantial and real wrong-doer? It would seem to be quite clear, that if the original act, assuming control over the horse, was not a substantial invasion of the

plaintiff's right of property, no subsequent use or abuse of the horse by the defendant could make it so; and that if the defendant cannot on the facts of this case be charged for the conversion of the horse, he could not have been if he had sold or wilfully destroyed him. In other words, the plaintiff having delivered the horse into the defendant's hands on a contract that was illegal, but which nevertheless left the general property in the plaintiff, the defendant may do what he will with the horse and the plaintiff can have no remedy, because whatever he does can be no more than a breach of his unlawful contract to return the horse. This does not appear to be a reasonable conclusion. The cases are not entirely unanimous as to what acts of a bailee, who receives goods on a void or voidable contract, are sufficient to make him liable for a tortious conversion. The question has arisen most frequently where infancy has been set up as a defence. *Vasse v. Smith*, 6 Cranch, 231; *Campbell v. Stokes*, 2 Wendell, 137; *Mills v. Graham*, 4 Bos. & Pull. 140; *Homer v. Thwing*, 3 Pick. 492, are strong authorities to the point that an infant who receives goods on a contract, and disposes of the property without right, is liable in trover; and these cases are cited and approved by the learned chief justice in *Fitts v. Hall*, 9 N. H. 443. *Wilt v. Welsh*, 4 Watts, 1, and perhaps *Jennings v. Randall*, 8 T. R. 366, must be regarded as somewhat in conflict with these cases. *Jennings v. Randall*, however, is criticised and doubted in *Fitts v. Hall*. *Homer v. Thwing*, 3 Pick. 492, maintains the position that in a case like this, driving the horse beyond the place for which he was hired, is a substantial conversion and a direct injury to the plaintiff's right of property, and not in substance a mere breach of the defendant's contract. In that case it was held that infancy was no defence to trover for such a conversion of a horse. If the action had been substantially upon the infant's voidable contract, he could not have been charged. We think the weight of authority and of argument are very decidedly in favor of the rule declared in *Homer v. Thwing*.

From these premises the conclusion would seem to follow that trover may be maintained on the facts of this case. If the plaintiff made an illegal contract respecting the horse, that contract is void; but the illegal contract being for a temporary use of the horse, the consequences do not extend to a forfeiture of the plaintiff's general right of pro-

perty; and for a wrongful invasion of that right he may maintain trover against the defendant, the *bailee*, or a third person. This is the doctrine of *Dwight v. Brewster*, 1 Pick. 51. In that case the contract was not only void, but illegal.

Driving the horse beyond the place for which he was hired is a wrongful invasion of the plaintiff's right of property, and a substantial conversion. In trover for such a conversion, the plaintiff's claim is neither in form nor in substance by, through, or under the illegal contract, and the invalidity and illegality of the contract are no defence to the suit. The contract is no link in the chain of the plaintiff's case; he shows the contract, which was invalid and illegal; but notwithstanding the contract and in spite of it, his right of property remained. That right has been directly invaded by the defendant's wrongful act, and this action is the appropriate remedy.

In this case, the defence set up is that the plaintiff's contract was not merely invalid, as in the case of infancy, but illegal; and that in showing the conversion of the horse, by driving beyond the place for which he was hired, the plaintiff was obliged to prove his own illegal act. It has been sometimes laid down in general terms that the plaintiff cannot recover, if, in order to make out his case, he is obliged to show his own illegal act. This is undoubtedly the rule where the plaintiff's illegal act is in whole or in part the foundation of his claim. In the cases usually cited as authorities for this rule, the plaintiff's claim was made through or under the illegal act. *Simpson v. Bloss*, 7 Taunton, 246, (2 C. L. 89;) *Fivaz v. Nichols*, 2 M. G. & S. 500, (52 C. L. 500.) But where the wrong is done to the plaintiff's property, and the facts are connected with an illegal contract respecting the property, which does not affect the plaintiff's right of property, these cases do not show that he cannot recover, because he is incidentally obliged to prove a contract which leaves his right of property untouched, and does not in its consequences reach to the case on which he relies. The illegal act of the plaintiff is in the case; *valeat quantum*; the question still remains, what is its effect on his right to recover?

Phalen v. Clark, 19 Conn. 421, which appears to have been a very well considered case, is strongly in point. The plaintiff in that case could not show his property in the lottery ticket, which was the subject of the suit, without show-

ing his illegal contract with the defendant, respecting the ticket; yet, as it appeared when the illegal contract was shown, that it did not extend to the plaintiff's property in the ticket, the court held him entitled to recover. The true rule is, we think, stated in that case as follows: "If the plaintiff requires any aid from an illegal transaction to establish his demand, he cannot recover it; or, in other words, if he is unable to support it without relying upon an unlawful agreement between him and the defendant, he must fail." 19 Conn. 432. Upon this point the dissenting opinion of Ellsworth, J., would not seem to weaken the authority of the case; for his dissent was put on the ground that the fraud of the defendant was committed in the execution of his illegal agency. He says: "The plaintiffs rest and must rest their claim to recover, on fraud in their agent, or fraud in a forbidden agency. The payment is an act in the progress and consummation of the illegal enterprise against the laws of this State." The majority of the court were of opinion that the illegal contract of the plaintiff was at an end, and that the injury was to the plaintiff's right of property in the ticket, notwithstanding the illegal contract which had been made respecting it. *Lewis v. Littlefield*, 15 Maine, 233, and *Dwight v. Brewster*, go to establish the same rule.

Nor is the plaintiff obliged to garble or suppress the facts of his case. When they all appear, his illegal act still leaves him his right of property in the horse, and his remedy for the conversion. It is not like the case of *Booth v. Hodgdon*, 6 T. R. 405, which was a claim made to recover premiums paid for illegal insurances, in which the plaintiff and one of the defendants had been jointly concerned.

One case of high authority we are obliged to regard as in conflict with the conclusion to which we have arrived, and that is the recent case of *Gregg v. Wyman*, 4 Cush. 322, in the Supreme Court of Massachusetts. The able and elaborate judgment in that case, and the great respect due to all the decisions of that court, have caused the principal hesitation which we have felt in holding that the present action could be maintained.

We understand the decision in *Gregg v. Wyman* to be put, in the first place, upon the ground that the claim of the plaintiff, though in form for a tort, was in substance to recover damages for the breach of the illegal contract. This position does not appear to be very confidently maintained,

and would seem to be entirely inconsistent with the case of *Homer v. Thwing*, 3 Pick. 492, decided in the same court. If the cases are to be regarded as in conflict, we prefer the rule of *Homer v. Thwing*.

The other ground is that the plaintiff could not prove his case without showing the illegal contract by which the horse went into the defendant's hands; that he could not show the conversion of the horse by driving beyond the place for which he was hired, without showing the terms of the illegal contract; and, therefore, as he was obliged to show his own illegal act in making out his case, he cannot recover.

Granting that in order to show the wrongful act of the defendant, upon which he relied, the plaintiff was obliged to prove that he had made an illegal and void contract and violated the law, the question still recurs and remains whether the consequences of his illegal act affect his right of property in the horse, and whether the defendant's act was a direct injury to that right, or only in substance a breach of the illegal contract. The general property remained in the plaintiff. That does not seem to be anywhere denied, and is the express doctrine of *Dwight v. Brewster*, and is necessarily involved in *Phalen v. Clark* and *Lewis v. Littlefield*. It would not seem to follow as a legal or a logical consequence, that because the plaintiff had made an illegal contract respecting the horse, which still left the property in him, that though the illegal contract necessarily appeared in the plaintiff's proof of a direct and substantive injury to his property, no recovery could be had. The illegal contract appears in the case; the plaintiff has violated the law, and the contract is void. What then? The plaintiff's property in the horse still remains. Was the act of the defendant within the limits and scope of the contract, and a mere breach of it? If so, he is not liable. But if the act was not covered by the contract, and done within it and under it, but was a direct voluntary wrong to the plaintiff's right of property, he may recover. The reasoning of the court in *Gregg v. Wynn*, is quite conclusive to show that the plaintiff, having absolute power over his own property, and having delivered it to the defendant, the plaintiff can never show that the defendant has done any wrong to his right of property without showing the contract on which it was delivered. So if the defendant should refuse to deliver the horse on demand, or should

sell him or destroy him, it would in none of these cases appear that any wrong had been done to the plaintiff until he showed the contract, and that the act of the defendant was not under and within it. Whether the horse was delivered on a sale to the defendant, or on an agency to sell, would not appear without evidence of the contract. It necessarily follows from this view of the case, that a man is wholly without remedy for any injury that may be done to the horse he lets on Sunday, in violation of law, if the necessity of showing his illegal contract will preclude his recovery. Though the property is conceded to remain in the plaintiff, he has no remedy to enforce his right, because he cannot show it without showing the illegal contract of letting. And in all the numerous cases where horses are illegally let on Sunday, the hirer might with perfect impunity retain or sell them. This appears to us to be pushing the application of a well settled principle to an unnecessary and extravagant length, not required nor warranted by the general current of the authorities. We are of opinion that the instructions of the court were correct, and that there must be judgment on the verdict.

We do not understand that we are by this decision infringing upon the rule that no action can be maintained on a contract made in violation of law; we mean to leave that principle wholly untouched; but are of opinion that it does not reach to this case.

Superior Court of New Hampshire, Strafford, December Term, 1848.

VARNEY v. FRENCH.

Contracts on Sunday.

The act of December 24th, 1799, prohibited the transaction of secular business on the Lord's day under a penalty, without any qualification whether it were performed by a person alone, or in company with others.

The first section of chapter 118 of the Revised Statutes so far altered the law, that it prohibited the transaction of secular business on the Lord's day, only when it was done to the disturbance of others.

Any business tends to the disturbance of others, and is consequently prohibited, which withdraws the attention from the appropriate duties of the Sabbath, and turns it to other things.

An act done by a person is none the less a disturbance within the meaning of the statute, although other persons present may not object to its performance.

A contract for the sale of a mare was made on Sunday, and a promissory note for the price was executed and delivered on that day. The note was given at the house of the plaintiff, whose wife was present in the room where the contract was made, reading a newspaper, and she and a witness were the only persons present when the contract was made, except the parties. *Held*, that the act of giving the note was a business of a secular calling, tending under the circumstances to the disturbance of others, within the meaning of section 1, chapter 118 of the Revised Statutes, and that no action could be maintained on the note.

ASSUMPSIT on a promissory note made by the defendant, and dated on the 28th day of August, 1847, for the sum of \$80.00, payable to the plaintiff on demand. The writ was dated on the 9th day of December, 1847.

Plea the general issue, with a brief statement, alleging, among other things, that the note was given, and the contract forming its consideration, made on Sunday.

At the trial, it appeared that the note was given for the purchase-money of a mare, that the contract of sale was made on Sunday, and that the note was written, signed and delivered on that day, and was antedated that it might not bear date on Sunday. The note was given at the house of the plaintiff, and his wife was present in the room while the conversation was going on, and when the note was given, reading a newspaper, and no other person was present except the parties and the witness who went to the house with the defendant.

The court instructed the jury that the fact that the note was made on Sunday was no bar to the plaintiff's right to recover.

The jury returned a verdict for the plaintiff, which the defendant moved to set aside.

Christie, for the plaintiff; *Woodman*, *Eastman*, and *J. S. Wells*, for the defendant.

GILCHRIST, C. J.—The act of December 24th, 1799, prohibits any person from doing or exercising any labor, business or work of his secular calling upon the Lord's day, under a penalty of from one to six dollars. *N. H. Laws*, 167, (Ed. of 1830.)

Under this statute it was held, in the case of *Frost v. Hall*, 4 *N. H.* 153, that the seizure of swine found at large, in violation of law, by a hogreeve, was a work or business belonging to a secular calling within the meaning of the statute, and as such prohibited. In the subsequent case of *Shaw v. Dodge*, 5 *N. H.* 462, it was held that the service of civil process fell within the prohibition, was

unlawful, and could not be justified if done upon the Lord's day. And the doctrine of these cases seems to be recognized in *Clough v. Davis*, 9 N. H. 500, although in that case it was unnecessary to decide whether the note on which the action was brought was void as having been made on Sunday. But in the case of *Allen v. Deming*, 14 N. H. 133, it was decided that the execution and delivery of a promissory note on Sunday was "business" of a person's "secular calling," and as such was prohibited under a penalty, and that the note was void.

The law remained in this condition until after the passage of the Revised Statutes. It is there enacted, by § 1, c. 118, that no person shall do any work, business or labor of his secular calling to the disturbance of others on the Lord's day, under a penalty.

The question then arises, what alteration, if any, has been made in the law by this section? What is the meaning of the words "to the disturbance of others?"

As to the point whether the legislature intended to alter the law in this particular, we entertain no doubt. The law had been generally understood from the Reports, and the substantial re-enactment of the former statute, with the insertion of these words, renders it sufficiently apparent that some modification of the former law was intended. And there is an evident distinction between the two statutes, apparent from reading them together and comparing them. The act of 1799 prohibits the exercise of the *secular calling*, without any qualification. Whether it be exercised alone or in the midst of a city, whether it be carried on by the offender without assistance, or conjointly with others, whether there be witnesses to the act, or he be tried and convicted on his own confessions alone, the transaction is equally within the prohibition of the statute. It makes no difference whether the calling be a quiet and noiseless pursuit, carried on in the person's own house, or one which attracts the public attention, and is accompanied by noise and clamor. It is enough that the pursuit is a business of the secular calling of the individual. The statute goes farther than merely to protect the public peace, and punishes the offender, not simply because the public quiet is endangered, or may be so, but because the act is considered to be wrongful in itself and produces an injurious effect upon him who performs it. It has both an individual and a general purpose. While it protects the

solemnities of religion from interruption, and secures the public in their peaceful performance, it reminds the individual that he has religious duties to fulfil, and religious duties alone. It tends to secure to him time and opportunity for their fulfilment by prohibiting him from performing other things, and induces him to turn his attention for one day in the week to religious reflection, by refusing him permission to distract his mind by occupying himself with his worldly affairs. It cannot legislate him into a religious man, but it keeps him from business, and forbids business to come to him, and aims at doing what may reasonably be attained without infringing his freedom of conscience.

Such is, in our view, the fair and reasonable construction of the act of 1799, and it is proper to inquire into the construction of the first section of chapter 118 of the Revised Statutes, in order to see what change has been effected from the former law.

In the first place, it is obvious that it is not considered expedient by the Revised Statutes to attempt to attain one object which the act of 1799 had in view; that is, the good effect upon the individual, by prohibiting him from exercising his secular calling. By the act of 1799 he could not do this under any circumstances. By the Revised Statutes he may do it with a qualification, a condition, and that is, that it be not "to the disturbance of others." This provision aims only at protecting the public in their devotions and religious reflections; others, the law says, shall not be disturbed. It leaves each individual to employ himself as he may choose, subject only to this limitation. It does not aim at guarding him from himself. It does not seek to interest him in religion, by forbidding him to interest himself in things not religious. It leaves him to his own conscience, and does not attempt to furnish any other guarantee for the religious and devotional employment of his time, than such as may be afforded by his own views of his religious obligations.

This, then, is an important change in the law. It shows that there is a radical difference in the theories on which the two statutes proceed. How much farther the legislature intended to go, what meaning they probably attached to the words "to the disturbance of others," is a subject for further inquiry.

The word "disturbance" has no such intrinsic force and meaning as would enable us to determine its effect, apart

from the connection in which it appears. Any thing which throws into confusion things settled, which interrupts the movements, pursuits or thoughts of another may be a disturbance. So if it distract his attention, call his mind off from one train of thought and divert it to another, it may be said to disturb him. A thousand things might or might not disturb others in fact, according to their then existing pursuit, and this renders it an extremely difficult thing to lay down a general rule which shall definitely settle what is or is not a disturbance. If nothing can be considered a disturbance which people willingly submit to, and take a part in, then the legislature did not intend to prohibit any assembly of persons for whatever purpose, provided the people present are willing to give up their religious duties and take part in whatever is done. In such case, they could have no cause for complaint; *volenti non fit injuria*; no disturbance has been caused to *them*. Upon this principle, a horse race in a public street would be no disturbance if the people chose to desert the churches and assemble on the race-ground. A military parade on the Sabbath would not be prohibited, if the bystanders or those who heard it, preferred military to sacred music. A theatre or a circus, a menagerie or a political caucus, would no more be disturbances than would the services in the churches. But we do not think that such would be the true construction of the act. We think it evident that in one respect a radical change has been made, and that the act had a certain intelligible purpose in view, and we are not called upon to construe the statute away, and endeavor to ascertain how few cases can come within it. The only safe meaning we can give to the word "disturbance" is a comprehensive one, going upon the ground that the main purpose of the law was to relieve an individual from the penalty who had been guilty of no act that actually did, or that tended to disturb and distract the minds of others from those religious observances which the act unquestionably intended to respect. Such being the object of the statute, nothing should be tolerated that tends to defeat it. If a person should desire to buy a horse, he would have no right to go to the owner on the Sabbath and make his propositions for the sale, because that would tend to disturb the quiet of the owner on the day which the statute intended should be respected. And even if the owner be willing to be thus disturbed, that willingness will not make

the contract valid, for the disturbance is prohibited by the statute. The parties would be *in pari delicto*. In the case before us, the defendant took with him a witness, so that in addition to the disturbance to the plaintiff, there is the further violation of the letter and spirit of the act in regard to the witness, and also the additional interruption to the plaintiff's wife. That these were "disturbances" within the meaning of the act we are fully satisfied, and any other construction would enable any number of people who were desirous of doing so, to engage in any business or amusement which those who should see and hear might find their pleasure in, and to such an extent we think the legislature never intended to go.

The contract, then, having been made on Sunday, was void, as being prohibited under a penalty, upon which point it is unnecessary to cite authorities. It is equally clear that there can be no ratification of a void contract. A sale of the mare by the defendant could not have that effect. We cannot lose sight of the fact that the defendant obtained her, and the plaintiff parted with her in pursuance of a contract made on Sunday. The plaintiff, then, can maintain no suit upon or for any matter founded upon the contract, for he does not come into court with clean hands. In such a case, a recovery is forbidden, not because any favor is felt for the defendant, who is equally guilty with the plaintiff, but, as Mr. Justice Woodbury says in *Chauncey v. Yeaton*, 1 N. H. 156, speaking of illegal contracts, "on account of the impurity of the subject-matter of the claim, and the pollution which soils the plaintiff in connecting himself with that subject-matter."

Cases of seeming hardship may easily be imagined, where a person who happened to be present might ungraciously interpose his veto upon a transaction, by alleging that the business, however quietly transacted, was a disturbance to him. But this result is necessary, and no ingenuity can avoid it, and cases may happen, as they do under the application of all general rules, where injustice may be done. If, however, the natural tendency of an act be to attract the attention of others, how many persons must be affected by it before it can assume the character of a disturbance? Where shall the line be drawn? If a disturbance to a solitary individual be not enough, how will it be if there are ten persons to be affected, or a hundred? It is evident that it would, in all cases, be a question

of the application of a principle, and not of convenience or inconvenience, and the rule must be applied in all cases that come within it, whatever results might follow.

Verdict set aside.

Miscellaneous Intelligence.

FRENCH POLICE. — A criminal, from the United States, named Ainsley, alias Dupont, has been reclaimed and sent home this week by the French authorities, which is the first case of reclamation that has occurred under the extradition law of 1852, between France and the United States. The incomprehensible power of the Paris Police was never more thoroughly displayed than in the arrest of this man. Ainsley committed a forgery on the Bank of Louisiana for a large sum — I believe fourteen thousand dollars. He escaped to Europe, and rapidly squandered his money in gambling, debauchery, and high living, mostly at the baths of Germany and Paris. He entered France under the assumed name of Dupont, with a passport bearing that name, and with a personal appearance which answered to the passport.

After he had remained in Paris some time, leading a most dissolute life, a reclamation arrived from the United States at the Prefecture of Police in this city, asking for the arrest of this man, if he was in Paris. Out of the more than hundred thousand foreigners in this great city, the police had nothing to guide them but the name Ainsley, and the description of his person. Yet this name, it must be recollected, was known to no one in Paris, since it was not on his passport. There was, then, nothing but the description of his person, so far as the public knows of the operation of this inscrutable power, to serve as a guide in his detection. Yet, on the second day after the arrival in Paris of the order from New Orleans, Ainsley found himself under bars and bolts in the old Conciergerie prison. When one reflects that this was accomplished in the midst of a crowded population of twelve hundred thousand persons, where there are always ten times more visitors from foreign nations than in any other city in the world, that Ainsley talks French and looks like a Frenchman, he gains some idea of the power of this police, and realizes why it is that crime is so unfrequent at Paris, compared to other large cities. It is positively frightful to think of the extent of this power, and of the certainty with which every man's identity must be known, and his most intimate movements watched and recorded.

Ainsley had elegantly furnished apartments in the fashionable Rue de Choiseuil, where he was *en menage* with a French girl named Louise Dupont. When the Commissary of Police entered the apartment, Ainsley was reading in slippers and robe-de-chambre, while his mistress was engaged in needle-work. The commissary demanded of Ainsley his name. "They call me Dupont," was the reply. "And your name, Mademoiselle?" "Louise Dupont." Looking Ainsley sharply in the face, the commissary said: "It may be the custom in your country when a man marries to take the name of his wife, but in France it is the reverse. I have evidence that you are living under a false name. Your real name is Ainsley; you are an American; and I arrest you for forgery on a bank in New Orleans." Ainsley made no sign of surprise, but the girl, more

impressible, almost sprang from her chair, and uttered a cry of surprise. The prisoner at first denied his identity, but, when brought before the Judge of Instruction at the Palais de Justice, he avowed all. He leaves in a packet-ship from Havre this week, in the care of the captain. — *Corr. New York Tribune.*

THE BASIS OF TRADE. — The answers made by a person called Joseph Windle Cole, in the Court of Bankruptcy a few days ago, to certain questions touching his business and the mode in which he carried it on, gave melancholy proof of the dangerous extent to which unprincipled manœuvring to raise the wind, so as to carry on business without capital, is practised in this great hive of commerce. In answer to one of these questions Cole said: "I had been bankrupt in 1847, and had no capital when I recommenced business, except loans from friends." In answer to another, he replied: "My transactions were very extensive; in 1853 I should think about two millions."

These two answers, when placed in close connection, are most astounding. Here is an extent of business done *without any real capital* equal to the trade between many two countries, and sufficient, had it been a *bonâ fide* trading, to have placed the person who directed it among the merchant princes of the world. The correctness of these answers might well be doubted, owing to the almost inconceivable possibility of the fact, were they not supported by facts which cannot be gainsaid. One of them is, that debts to the amount of £200,000 have already been proved under Cole's bankruptcy. Who will say after this, "*ex nihilo nihil fit*?" Imagination is bewildered in endeavoring to trace the rise of a trade of two millions per annum out of nothing at all. The manner in which this trade was carried on was in keeping with its commencement. "I kept no cash-book, ledger, or journal; I made my hanker's check-book a rough cash-book." Rough enough, indeed! "I should have spoilt my operations if I had allowed my clerks to keep a journal." This, we think, is very probable, but such a *naïve* confession is very striking. — *Corr. National Intelligencer.*

NOTICE. — We apologize to our readers and correspondents for the delay in the publication of this number, and for the omission of articles which will appear in our next. We beg them to find some compensation in the interest or value of those contained in the present number for their length and want of variety.

Insolvents in Massachusetts.

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Commissioner.
Adams, John Q.	Boston,	Dec. 8, 1854,	John P. Putnam.
Adams, Samuel*	Beverly,	" 30,	John G. King.
Allen, Emory A.	Randolph,	Jan. 3, 1855,	Samuel B. Noyes.
Amadon, Eliot T.†	Randolph,	Dec. 12, 1854,	Samuel B. Noyes.
Atwood, Joshua	Warver,	Nov. 21,	John J. Russell.
Atwood, Moses	Georgetown,	Dec. 13,	John G. King.
Bacon, Avery	Barre,	" 7,	Charles Brimblecom.
Baker, George W.	Soughton,	" 2,	Samuel B. Noyes.
Barrett, Samuel G.	Bridgewater,	" 29,	Welcome Young.
Bates, Franklin	Fairhaven,	Sept. 22,	Joshua C. Stone.
Bell, John, Jr.	East Bridgewater,	Dec. 19,	Welcome Young.
Blackinton, Oliver	Towley,	" 30,	John G. King.

* For Notes to the above references, see next page.

Name of Insolvent.	Residence.	Commencement of Proceedings	Name of Commissioner.
Blodget, John W. †	Boston,	Dec. 11, 1854,	Charles Demond.
Bodfish, David P. §	Haverhill,	" 14,	N. W. Harmon.
Bradford, Wm. R.	Boston,	" 12,	John P. Putnam.
Brock, Ephraim	Lynn,	" 26,	John G. King.
Brown, Horatio G. Jr.	Boston,	" 12,	John P. Putnam.
Bruce, Silas	Townsend,	" 15,	Asa F. Lawrence.
Bundy, J. C. †	Boston,	" 11,	Charles Demond.
Burbeck, Lucius D.	East Bridgewater,	" 28,	John J. Russell.
Byron, George E. †	Boston,	" 25,	N. W. Harmon.
Caldwell, Wm.	Rockport,	" 25,	John G. King.
Clapp, John P.	Dorchester,	" 21,	Francis Hilliard.
Colburn, Willis H.	Boston,	" 23,	John P. Putnam.
Couch, Wm. G.	Lee,	" 1,	Lorenzo H. Gamwell.
Cummings, Daniel	Woburn,	" 22,	Asa F. Lawrence.
Dolliver, Thomas H.	Lawrence,	Nov. 18,	N. W. Harmon.
Drake, Charles C.	Marlboro',	Dec. 18,	Asa F. Lawrence.
Farrar, Isaac	South Scituate,	" 18,	Welcome Young.
French, Wm. P. †	Boston,	" 26,	Charles Demond.
Glendon, Rolling Mills,	Boston,	" 18,	John M. Williams.
Goodnow, A. †	Boston,	" 11,	Charles Demond.
Gore, W. Jr. †	Boston,	" 11,	Charles Demond.
Hall, Hiram L.*	Reverley,	" 30,	John G. King.
Hancock, Franklin	Boston,	" 26,	John P. Putnam.
Harris, Samuel D.	Milford,	" 26,	T. G. Kent.
Harvey, Horatio N. §	Haverhill,	" 14,	N. W. Harmon.
Heywood, Benjamin	Worcester,	" 30,	Alexander H. Bullock.
Huvey, Abner B.	Stoughton,	" 13,	Asa F. Lawrence.
Johnson, Benjamin	Malden,	" 8,	Isaac S. Morse.
Jones, George W.	Ashland,	" 27,	Isaac S. Morse.
Jones, Owen	Salem,	" 26,	John G. King.
Kelly, Ignatius A.	Boston,	" 26,	Charles Demond.
King, Joshua H.	Abington,	" 5,	Welcome Young.
Lamson, Alvin F.	Boston,	" 22,	John P. Putnam.
Lemist, Edwin	Roxbury,	" 16,	Samuel B. Noyes.
Lombard, Augustus	Charlestown,	" 7,	Isaac S. Morse.
Mandell, T. S. †	Boston,	" 11,	Charles Demond.
Moody, Saml. Sewell	Newbury,	" 12,	N. W. Harmon.
Moore, Gardner	Wayland,	" 12,	Joshua Rutter.
Parker, Wm. C.	Lowell,	" 4,	Isaac S. Morse.
Parkhurst, Austin N.	Winchendon,	" 21,	C. H. B. Snow.
Payne Zebulon, Jr.	Ashfield,	" 13,	David Aiken.
Peabody, Charles †	Newburyport,	" 25,	N. W. Harmon.
Pettigrew, Thomas	Boston,	" 19,	John P. Putnam.
Pollard, Gorham L.	Lowell,	" 15,	Isaac S. Morse.
Preble, Rufus S.	Canton,	" 23,	Samuel B. Noyes.
Putnam, Lorenzo R.	Washington,	Nov. 15,	Charles N. Emerson.
Read, Joseph	Charlestown,	Dec. 20,	Isaac S. Morse.
Rettger, Nicholas	Chelmsford,	" 8,	Isaac S. Morse.
Ross, James †	Boston,	" 26,	Charles Demond.
Stone, S. S. †	Boston,	" 11,	Charles Demond.
Swift, Joseph	Charlestown,	" 21,	Isaac S. Morse.
Taylor, Sereno E. D.	Lynn,	" 20,	N. W. Harmon.
Tinkham, Frank J.	Boston,	" 8,	John P. Putnam.
Tirrell, Norton Q.	Weymouth,	Jan. 2, 1855,	Samuel B. Noyes.
Turner, Wm. H.	Lowell,	Dec. 14, 1854,	Isaac S. Morse.
Walker, George	Brookline,	" 11,	Samuel B. Noyes.
Wall, Charles E.	New Bedford,	Nov. 3,	Joshua C. Stode.
Watts, Horatio C.	Concord,	Dec. 9,	Joshua Rutter.
Webb, Nathan H.	Pittsfield,	" 12,	Charles N. Emerson.
Wild, Jonathan	Braintree,	" 23,	Samuel B. Noyes.
Willard, Wm. D.	West Roxbury,	" 18,	John M. Williams.
Winn, Parker	Boston,	" 14,	John P. Putnam.

* Eagle Rubber Company and Beverly Rubber Company.

† Proceedings stayed by Supreme Court until February term.

‡ J. W. Blodgett & Co.

§ Bodfish & Harvey.

|| George E. Byron & Co.

¶ Partners. Firm not stated.

THE
MONTHLY LAW REPORTER.

MARCH, 1855.

LIABILITIES OF LODGING-HOUSE KEEPERS.¹

THE law on this very important branch of contract is now completely unsettled by the recent difference of judgment in the Court of Queen's Bench, in the case of *Dansey v. Richardson*, 23 Law J., Q. B. 217.

We will state the case and the *rationale* of the conflicting judgments, and then adventure a few remarks upon the law, as it seems to us to be, on a subject, which the large amount of property and responsibility at stake render it desirable should be determined with as little delay as possible.

The plaintiff was a lady boarding in the house of the defendant at a weekly payment, upon the terms of being provided with board and lodging, and attendance. The plaintiff being about to leave the house, sent one of the defendant's servants to purchase some biscuits, and he left the door ajar, and whilst he was absent on the errand a thief entered the house, and stole a box of the plaintiff's from the hall. The learned judge directed the jury, that the defendant was not bound to take more care of the house and the things in it than a prudent owner would take, and that she was not liable if there were no negligence on her part in hiring and keeping the servant; and he left it to the jury to say whether, supposing the loss to have been occasioned by the negligence of the servant in

¹ From the Law Magazine, for November, 1854.

leaving the door ajar, there was any negligence on the part of the defendant in hiring or keeping the servant. It was held by the court, that at least it was the duty of the defendant to take such care of her house, and the things of her guests in it, as every prudent householder would take. Lord Campbell, C. J., and Coleridge, J., held, that she was bound, not merely to be careful in the choice of her servants, but absolutely to supply the plaintiff with certain things, and to take due and reasonable care of her goods; and that, if there had been a want of such care as regarded the plaintiff's box, it was immaterial whether the negligent act was that of the defendant or her servant, though every care had been taken by the defendant in employing such servant; and, consequently, that the direction of the learned judge was not correct.

Wightman and Erle, JJ., however, held, that the defendant was not bailee of the goods, and that her duty required merely that she should take the same care of her lodger's goods that a prudent owner would do of her own, and that as there was no proof that the defendant had been negligent in hiring trustworthy servants, she could not be held answerable for a single act of negligence, such as that which occasioned the loss in question.

There was, apparently, no doubt that the servant must be deemed the agent of the defendant, and that the usual sequences of that relation attach to this case; so Story's *dictum*, "that the master is always liable to third persons for the misfeasances, and negligences, and omissions of duty of his servant, within the scope of his employment," is *primâ facie* applicable to this case. The point at issue is, what kind of misfeasances and negligences is a lodging-house keeper liable for? Must it be actual or constructive negligence? And is she so liable for the safe custody of her tenant's goods as, for example, a carrier or railway company, for negligence by their servants, without any fault or laches on her own part? In fact, the question may be still more briefly summed up in this: Was the defendant a bailee for reward or not? If she were, her liability is clear and undisputed; for, as Story holds, the hirer (or hiree, as the case may be,) is not only liable for his own personal default and negligence, but for that of his children, servants, and domestics about the thing hired. And in this case the law, both old and new, is sufficiently explicit, as these cases suffice to show:—

"If a man brings a horse to a smith to be shod, and the servant pricks it; or if the servant of a surgeon makes the wound worse; in both these cases an action lies against the master. Bac. Abridg. 'Master and Servant,' K. See *Pilkington's case*, 21st vol. Abridg. 693; Cro. Eliz. 181.

"The master must also answer for torts and injuries done by his servant in execution of his authority; as where a pawnbroker's servant took a pawn, the pawner came and tendered the money to the servant, who said he had lost the goods; upon which the pawner brought trover against the master, and it was held well. 2 Salk. 441, part 2, per Holt, C. J. See also Lord Raymond, 738, Cas. temp. Holt.

"So where a carter's servant run his cart over a boy, it was held the boy should have his action against the master for the damage he sustained by this negligence." (Cited in the last case.)

So also the servant of the hirer leaving the stable-door open, so that the vendor's horse is lost, or the agister the gate of the field; it is admitted that these are negligences of the servant which render the master liable, but because he is bailee.

Justices Wightman and Erle held that the defendant was *not* bailee; and the latter justly puts the question thus:—

"In the class of cases relative to certain bailees for reward, who are liable for the loss of the goods, if they are stolen through the negligence of their servants, the goods are delivered to and are in the possession of the bailee, who, by the contract of bailment for reward, undertakes a private duty to the bailor to keep them with care, and to deliver them again; and this private duty is the test to ascertain whether any alleged state of facts amounts to actionable negligence; for the question, whether given facts amount to actionable negligence, depends upon the legal duty owed to the party who affirms the negligence to be a breach of the duty owing to him by the opposite party."

Mr. Justice Erle assumes that there was no bailment for reward, on what we confess, with great deference to his better judgment, (and be it admitted that he tried the case,) is a series of mistakes in *fact*, rather than in law.

1. He says, "there was no delivery of the goods of the plaintiff to the defendant." Indeed, not when they were delivered to the defendant's servant within the scope of the duties which the defendant contracted, by her servants, to perform? And was not this precisely what took place when the goods were placed in the custody of the servant, and when, as the case states, he carried her trunk down stairs, and placed it ready for her departure in the hall? Delivery can scarcely be more complete.

2. Mr. Justice Erle says, "there is no contract to keep them [the goods] with care, and deliver them again." There is just as much a contract to keep the lodger's goods with care, as to keep herself with care. And it seems to be just as much a breach of that contract to cause the loss

of her goods, by negligence in leaving a door open, as to cause the loss of her health by negligence in giving her bad food or a damp bed.

3. "There is," adds Mr. Justice Erle, "no reward in respect of goods, the terms being the same for a boarder whether with or without goods." If so, then a boarding-house keeper can, of course, refuse admittance to his guest's luggage. If it is no part of the contract he has entered into to board the lodger at two or three guineas per week, as in this case, to house his goods, and if, as the judge further says, "there is no duty of keeping them, owing from the defendant to the plaintiff," there is certainly no duty of receiving; and the boarding-house keeper may refuse to give them admission when they are brought to her house. It is often hazardous to handsomely papered and carpeted staircases to have heavy boxes carried up them, and lodging-house letters are under an obligation to Mr. Justice Erle for the convenient consequences which flow from his decision. Again, does Mr. Justice Erle repeat in his judgment, that "the goods of the plaintiff remained in her possession and under her control, and were disposed of by her as she chose, without notifying what she had done to the defendant?"

This is obviously not so. They were placed, as we said before, not only constructively under her care when they entered the house, of which she, and not the plaintiff, had the control; but they were placed specially under her care by being so placed in the hands of her servant; one of whose express duties it was to deal with and take custody of them. The plaintiff needed no notification of her possession of the goods, inasmuch as it cannot be seriously disputed that the boarding-house keeper does contract to receive the goods, as well as the person of his lodger, and this is implied *ex necessitate* in the nature of the contract. And if notification were necessary of the special custody by the servant of the goods, it was also sufficiently implied by the knowledge the defendant had of the plaintiff's departure, and the customary duty thereupon devolving on her servant to remove the luggage of the departing guest.

We have therefore in this case every fact which can make the defendant bailee for reward. It is admitted that she lodged the plaintiff for reward, and it is absurd to deny that she also lodged for reward, that which was essential to

the lodger's enjoyment of her contract, namely, her luggage. Mr. Justice Erle's hypothetical lodger, without any goods, would certainly be an eccentric phenomenon; at any rate a very abnormal lodger; imposing small necessity on other lodgers, to notify their possession of wearing apparel and its presence in their lodgings. The plaintiff also was the constructive depositary of the goods, just as much as any warehouseman or carrier. Her house received them; her servant had sole charge of the safe keeping of the goods in that house when they were lost; and she, the defendant, had sole control over her servant. This case comes, therefore, in all natural respects, within that class of cases referred to in the famous judgment of Lord Mansfield in *Coggs v. Barnard*: —

“ But if he or his servant leave the house or stable doors open, and the thieves take the opportunity of that, and steal the horse, he will be chargeable, because the neglect gave the thieves the occasion to steal the horse. Bracton says, ‘ the bailee must use the utmost care, but yet he shall not be chargeable where there is such a force as he cannot resist.’ ”

The nature of the relation between the plaintiff and defendant being thus clearly that of bailor and bailee for reward, it is quite irrelevant to import into the consideration of the case, what care the defendant did or did not take in hiring trusty servants. It is presumable the railway directors take especial care to select careful drivers and guards of their trains; yet what railway company ever yet dreamt of pleading to an action for injury to a passenger or his goods, that they had taken due exercise, care, and discretion, in selecting and hiring their servants! But such a question is wholly impertinent to the issue under any aspect. If the lodging-house keeper never has charge or even cognizance of her lodger's goods, as Mr. Justice Erle contends, it is quite immaterial whether she has careful servants or not, for they have no duty to perform in respect to the lodger's goods, and can therefore be guilty of no breach of duty respecting them; at any rate, none such as can implicate their mistress. If the defendant had charge of the goods, no care she may have taken to hire careful servants can exempt her from her liability as bailee for reward. According to Justices Erle and Wightman in this case, there must be double negligence, — first, in the mistress as regards the hiring of the servant; secondly, in the servant in not taking proper care of the goods. Very justly and ably did Mr. Justice Coleridge say this “ seems

to me a novelty in the law, without a foundation in any satisfactory principle, complicating the inquiry for the jury very inconveniently, and likely to lead them to unjust conclusions." It also introduces a most impracticable and vague standard of liability. The irresponsibility of the master is, as the learned judge also said, "consistent with the grossest negligence, even misfeasance of the servant; for a mistress who uses all ordinary care in the hiring and overlooking of her domestics, yet may take careless or wilful servants, or drunken ones, or she may unfortunately have a servant who is commonly sober, and yet who, upon one occasion being intoxicated, may occasion great loss or injury to the goods of the guests in the house."

From the great facilities for robbery and loss by inadvertence and negligence in an inn, an innkeeper is held liable with much more strictness¹ for the goods of his guests in his house, although he may be entirely ignorant of their existence there. But still a liability also devolves on boarding and lodging-house keepers, by no means very different in degree, for the circumstances are not dissimilar.

We much regret the unsettled state in which practically the law is left by the view which those estimable judges, Justices Wightman and Erle, took on the subject of this case. We, however, cannot do better than cite the following common sense lucid statement of what always has been the law, and we trust always may be, on this important branch of the law of contracts, from Lord Campbell's judgment:—

"I think there may be negligence in a servant in leaving the outer door of a boarding-house open, whereby the goods of a guest are stolen, which might render the master liable. I think there is a duty on his part, analogous to that incumbent on every prudent householder, to keep the outer door of the house shut at times when there is danger that thieves may enter and steal the goods of the guest. If he employs servants to perform this duty, while they are performing it they are acting within the scope of their employment, and he is answerable for their negligence. He is not answerable for the consequences of a felony, or even a wilful trespass committed by them; but the general rule is, that the master is answerable for the negligence of his servants while engaged in offices which he employs them to do; and I am not aware how the keeper of a lodging-house should be an exception to the rule. He is by no means bound to the same strict care as an innkeeper; but within the scope of that which he ought to do, I apprehend that he is equally liable, whether he is to do it by himself or his servants. The doctrine, that inquiry is to be made, whether the master was guilty of negligence in hiring or keeping the servants, is, I believe, quite new."

¹ A strictness somewhat weakened by the late decision in *Amistead v. Wilde*, Q. B., where the defendant was held exonerated because his guest had displayed money and then put it into an insecure box.

We trust it will prove equally evanescent, as we are sure that it has never been acted on in the practical working of the law. So far from agreeing with Wightman and Erle, JJ., that the fact of there having been hitherto no decision expressly declaring the liability of lodging-house keepers, is a proof that they are right in their judgment, we submit that it is just as admissible as a proof that they are wrong; for a rule of law perfectly understood and generally acted upon, is for that very reason seldom the subject of the decision or *dictum* of a court *in banco*.

Recent American Decisions.

Circuit Court of the United States, for the District of Massachusetts, October Term, 1854.

JAMES A. ABBOTT et ux. v. THE ESSEX COMPANY.

Devise.

Devise to A. and B. in the following words: I give to my two sons, viz., John and Jacob Kittridge, all my land and buildings in Andover aforesaid, (excepting the land I gave to my son Thomas, aforesaid,) which buildings consist of dwellings, houses, barns, corn-house, grist mill and cider mill, all of every denomination; also all my live stock, of cattle, horses, sheep, and swine, and all my husbandry utensils of every denomination, and all my tools that may be useful for tending the mills aforesaid; and also all my bonds and notes of hand and book accounts, together with what money I may have at my decease, and my wearing apparel. I give the same to my said sons to be equally divided between them; and in consideration of what I have given my said sons, John and Jacob Kittridge, the executor of this testament [hereinafter named] is hereby ordered to see that all my just debts and funeral charges, together with all the legacies in this will mentioned, be paid out of that part of my estate I have given my two sons, John and Jacob Kittridge, to whom I give each one bed and bedding.

Item. — It is my will that if either of my said sons, namely, John or Jacob Kittridge, should happen to die without any lawful heirs of their own, then the share of him who may first decease shall accrue to the other survivor and his heirs.

Held, that the first clause, standing alone, would give a fee, and that by the proper construction of the whole devise, the share of the son first dying without issue in the lifetime of the other, was to go over to the survivor by way of executory devise, and that, subject to this contingency, each took a fee simple.

CURTIS, J. — Independent of the last clause, by which the estate is given over, I am of opinion that the sons would have taken an absolute estate in fee simple.

1st. Because one of the devisees, John Kittridge, is made executor of the will, and is required to see that all the testator's debts and legacies be paid out of that part of the testator's estate devised to himself and his brother Jacob. This is a charge on John, personally, in respect of the estate given to him, as was held in *Doe v. Snelling*, 5 East, 87; *Lithgow v. Kavenagh*, 9 Mass. 161; *Wait v. Belding*, 24 Pick. 129. The distinction is between a charge to be paid out of rents and profits only, and a charge to be paid by the devisee at all events out of the estate in his hands.

In the last case the devisee takes a fee, though, undoubtedly, it may be cut down to an estate tail by words showing that intent. *Slater v. Slater*, 5 T. R. 335.

As this would give a fee simple to John, and as the intent of the testator is clear to have the two take the same estate, the estates of Jacob would necessarily be held to be a fee simple also. *Ellenborough, C. J.*, in *Roe v. Daw*, 3 M. & S. 518.

2d. Among the legacies given by the will is the maintenance of Sarah Dwinall, until she should arrive at the age of eighteen years, "out of that part of my estate I give my sons John and Jacob Kittridge." If only life estates were given to John and Jacob, both might die before the legatee became of that age, and thus the clearly expressed intention of the testator be defeated.

3d. The testator directs his debts and legacies to be paid "out of that part of my estate I have given to my two sons, John and Jacob Kittridge." It is held in Massachusetts, in conformity with many decisions elsewhere, that if the testator had a fee, a devise of his estate carries a fee. The word estate, if not controlled by some other language of the will being construed to designate the quantity of interest, and not merely the *corpus* of the subject of devise. *Godfrey v. Humphrey*, 18 Pick. 537.

Now, though this use of the word estate occurs only in the clause charging the debts and legacies, and not in that employed to make the gift, yet the intent of the testator may as well appear in the former as in the latter clause.

Indeed, all those cases in which it has been held that a charge upon the devisee of a gross sum, or of debts and legacies, implies a gift of more than a life estate, are authorities to show that the testator's intent to give a fee may be found in such a clause. And if it may be inferred from

the duty created by such a clause, why not also from the language employed in creating that duty; provided that language is sufficient to show that the testator understood that he had given an estate in fee to his sons? If a devise, which, by its terms would carry only an estate for life, is followed even in another part of the will by language which shows the testator believed he had given a fee, a fee will pass, because the intent of the testator is to govern, and that intent is to be collected from the whole of the will.

This testator, in referring to what he had given to his two sons, calls it "that part of my estate." There are many cases in which it has been held that the word estate is to be construed to refer to the testator's interest in the land devised, although coupled with other words which could refer only to the particular land, the subject of the devise. Thus, "my estate consisting of thirty acres of land, situate in the parish of A——," "my estate in the occupation of B," carry a fee. 2 Powell on Devises, 413. Here the word estate, situate, &c., means not only the land, but the interest of the testator therein; so in the case at bar, "that part of my estate" means not only the particular tracts of land before decided, but the interest of the testator in those tracts of land. The question is, whether he intended to devise to each son an estate tail general, with cross remainders in fee, or a fee simple conditional with an executory devise over; and this depends on the intent of the testator to provide for a definite or indefinite failure of issue.

If the first taker was to have a fee simple, and the estate is given over on a definite failure of issue, that is to say, in this case, a failure at the decease of the first taker, then the limitation over may take effect as an executory devise, because the contingency is determinable within those reasonable limits established by law to prevent perpetuities. This has been the rule since the case of *Pells v. Brown*, Cro. Jac. 590.

I know of no question which is involved in so much doubt, and has been the subject of so many conflicting decisions, as this one concerning the definite or indefinite failure of issue.

It has been deemed expedient in England, and in several of the United States, to remove these distressing doubts and difficulties by legislation.

In Massachusetts there is no statute on the subject ; and this question in the case at bar must be decided according to the rules of interpretation, which make part of the common law of the State. If I can find in the decisions of the highest judicial tribunal of the State any settled rule of construction applicable to this will, and capable of determining whether this testator has provided for a definite or indefinite failure of issue, it is my duty, as it certainly would be my pleasure, to follow and apply it. In *Jackson v. Chew*, 12 Wheat. 153, and *Waring v. Jackson*, 1 Pet. 570, cases which went to the Supreme Court from the State of New York, that court declined to review the decisions on this subject, because it was found there was a settled rule in the State of New York. My first duty, therefore, is to ascertain whether the law of Massachusetts is settled.

The case of *Parker v. Parker*,¹ 5 Met. 134, was cited as controlling the case at bar. I do not think it can be so considered. I think that case was determined upon two points.

1st. That by the true construction of the whole will taken together, the sons took no more than an estate tail.

2d. That the rule in *Purefoy v. Rogers* required the estate limited over to take effect by way of contingent remainder.

It is true that the rule settled in *Purefoy v. Rogers*, 2 Saund. 380, has been often recognized in this country, and especially in Massachusetts. *Hawley v. Northampton*, 8 Mass. 3 ; *Nightingale v. Burrell*, 15 Pick. 104 ; *Parker v. Parker*, 5 Met. 134. That rule, as laid down by Lord Hale, is, that "where a contingency is limited to depend on an estate of freehold which is capable of supporting a remain-

¹ *Parker v. Parker*, 5 Met. 134, decided in 1842. A testator, after giving the use and improvement of all his real and personal estate to his wife during her widowhood, made the following residuary devise : "I give to my five sons all the residue and remainder of my real estate, to be equally divided among them, they to come into possession thereof when my wife's improvement ends. And if any or either of my said sons should die before they arrive at the age of twenty-one years, or should die without any legal heir of their body, then and in that case their share or shares shall descend equally to their surviving brother or brothers."

² *Held*, that each of the sons took an estate tail in one-fifth of the land devised, with cross remainder.

Held, also, that if this clause in the will had given to the sons a fee simple with a limitation over by way of executory devise, then the devise over could not have taken effect, unless one or more of the sons had died before coming of age, and without lawful issue.

A devise of "all the residue and remainder of my real estate" passes a fee, though no words of limitation or inheritance are added.

A devise of real estate, without words of inheritance, passes a fee, if the devisee is personally charged, in the will, with the payment of money to third persons.

der, it shall never be construed to be an executory devise, but a contingent remainder only, and not otherwise." But this rule does not operate until it is ascertained what the particular estate is, and that it is capable of supporting a contingent remainder.

I do not understand it to be a rule of construction to be used in determining what particular estate the testator intended to devise, but a rule of law which determines the kind of estate which must be deemed to be limited over after the particular estate intended to be devised has been ascertained. And, therefore, I have not allowed it to have any weight in this case.

The difficulty which I find in assenting to this decision arises from two considerations. The first is, that the limitation over is clearly upon a definite failure of issue, because the first taker must not only die without issue, but he must die before he arrives at the age of twenty-one. If he survives the age of twenty-one years the estate is not to go over, although the next day he should die without issue. In that event the estate is to go to his heirs general, [if he] leaves no heirs of his body, and the estate is not to go over; it must therefore go to his heirs general, if he has more than a life estate; and accordingly it has been decided in many cases that if the limitation over be upon the contingency of dying under age and without issue, the first taker has a conditional fee simple, and not an estate tail.

Mr. Justice Story so held in *Lippett v. Hopkins*, 1 Gall. 454, where the older authorities are all cited; and more recently the same rule is laid down and acted on in *Glover v. Monckton*, 3 Bing. 13; *Doe v. Johnson*, 16 Eng. Law & Eq. 550; *Barnitz' Lessee v. Casey*, 7 Cr. R. 456; and also in *Ray v. Enslin*, 2 Mass. 554.; and *Richardson v. Noyes*, 2 Ib. 56. This distinction between a definite or indefinite failure of issue was not adverted to by either the counsel or the court in *Parker v. Parker*.

It may not be easy to reconcile this decision with that of *Richardson v. Noyes*, 2 Mass. 56; but if there is any discrepancy, it touches the question what estate was intended to be given to the first taker.

As I am satisfied that under this will the sons were intended to have a fee, and as the provisions of this will are substantially different from those in the case of *Parker v. Parker*, so far as respects the estate of the first taker, I do not consider that case can apply to this one.

In *Hawley v. Northampton*, 8 Mass. 41, Mr. Chief Justice Parsons says: "Now it seems to be settled that a devise to one and his heirs, and if he die without issue, or without leaving issue, then to another, creates an estate in the first devisee with a remainder over, when the limitation over can take effect as a remainder, *unless there are other words to control his construction.*" This rule, with its qualifications, being in conformity with the earlier cases in Massachusetts, and with the whole current of decisions in England, and with very numerous decisions elsewhere, I consider to be the law of Massachusetts, and that the difficult inquiry in this case arises under the qualification of the rule; and is, whether there are in this will words sufficient to render inapplicable this rule of construction.

Before advertng to some of the most important cases on this subject, I think it may be said with truth that the American courts, while they have recognized the rule, have shown a strong disposition to lay hold on pretty slight expressions in the will to defeat its operation, — a tendency which has been effectually sanctioned, not only in several States in this country, but in England, by legislation which abolishes the rule altogether. A review of the American cases on this subject would occupy too much space. I will refer to some of the most important. *Anderson v. Jackson*, 16 John. 382; *Wilkes v. Lion*, 2 Cow. 333; 11 Wend. 259; 23 Ib. 313; Saund. Ch. R. 456; 3 Hal. 29; 5 Day, 517; 1 Con. 36; 6 Barr, 45; 10 Ib. 498; *Jackson v. Chew*, 12 Wheat. 153; 14 N. H. 215; opinion of Parker, C. J. And the Supreme Court of Massachusetts, (*Ide v. Ide*, 5 Mass. 500, and *Richardson v. Noyes*, 2 Mass. 56,) have evinced a like tendency. In *Ide v. Ide*, the devise was to the testator's son and his heirs; but if he should die and have no lawful heirs, what estate he shall leave to be equally divided between I. and N. This was held to import a definite failure of issue, by reason of the words what estate *he shall leave*. In *Richardson v. Noyes*, 2 Mass. 56, the devise was to three sons, not expressly in fee; and if either or any of them should die without children, the survivor or survivors to take. This was held to give a fee simple, defeasible on the first taker's dying without issue living at his decease.

Let us now turn to this will to see whether the testator intended to give the share of each son over, if he should die without issue living at his decease, or upon an indefinite failure of issue.

His words are, that if either of my said sons should happen to die without any lawful heirs of their own, then the share of him who may first decease shall accrue to the other survivor and his heirs.

The words, "without any lawful heirs of his own," cannot be construed literally, because the contingency provided for is the survivorship of one who would necessarily be a collateral heir; heirs of his own, must therefore be construed to mean lineal heirs of his own. Lewis on Perpetuities, 311; 2 Jarman on Wills, 238.

The question is, whether this failure of lineal heirs was to be on the decease of the first taker, or at any time afterwards. I am of opinion that it was a definite and not an indefinite failure of issue which was thus provided for, and for the following reasons:—

1st. There can be no doubt that a fee simple, and not a fee tail is devised over. The devise is to "the other survivor and his heirs;" yet this is called the *share* of him who may first decease. If the word share is construed to mean the quantity of interest in the particular land which was devised to him who may first decease, it would follow that, inasmuch as a fee is given over from the first taker, a fee was devised to the first taker; such a deduction is but the converse of the reasoning by which a fee is held to pass under a devise of the testator's estate. That reasoning is, that the word estate means the interest of the testator, and as he had a fee simple, a fee simple is given. Here a fee simple is given over, and it is designated as the share of the first taker. If that means the estate or quantity of interest of the first taker, the testator has, in effect, described it as a fee simple, by giving it over as such. I do not perceive any good reason why the word share may not be thus interpreted.

In *Pettywood v. Cook*, Cro. Eliz. 52, where there was a devise in fee to three persons, in severalty, and if either of the devisees should die without issue, the survivors should enjoy "*totam illam partem*," it was held only a life estate was given by those words; but Willes, C. J., in *Moone v. Heaseman*, Willes, 143, says, he should have decided otherwise, as does Lord Ellenborough, in *Bibb v. Penoyre*, 11 East, 160, who was inclined to the opinion that the words "my half part" would carry the interest of the devisor.

In *Denn v. Balderston*, Cowper, 257, there seems to have

been no doubt felt that the words "their property and share in the premises" would carry the whole estate; and the use of the phrase "share and share alike" is habitual among conveyancers, to designate an equal division of the subject, both as to quantity of estate as well as the *corpus* or thing devised. So in *Paris v. Miller*, 5 M. & S. 408, the words being "my share of the Bastile and other estates," it was held that the word share denoted the interest in the thing devised. Without undertaking to say that a devise over of a fee, by the name and description of the share of A. B., necessarily imports that A. B. took a fee, I think it has a tendency to show such was the understanding of the testator, which may or may not be sufficient, according to the particular phraseology of the will in question.

2d. This gift to the two sons includes personal as well as real estate. The assumption that the testator intended to limit over personal estate, consisting of tools and utensils, bonds and other *choses in action*, and cattle and horses, in the want of an indefinite failure of issue is very violent; a similar state of facts in *Richardson v. Noyes*, 2 Mass. 56, led Mr. Justice Sedgwick to declare that such a supposition was absurd. I am aware that there is considerable weight of authority in favor of the position that this difficulty is to be got over by holding that two different limitations were intended; that as to realty the testator intended an indefinite, and as to the personalty a definite failure of issue. This resort seems to be countenanced by Parsons, Ch. J. In *Hawley v. Northampton*, 8 Mass. 39, he refers to some of the authorities which support it; others are 2 Atk. 288; 9 Ves. 203; 2 Chitty, 662; 1 Bailey's Eq. 48. But I apprehend that the number as well as the weight of the authorities is the other way. 3 Atk. 147; 1 Taun. 347; 2 Russ. & M. 390, denying the distinction between real and personal estate, as do Lord Hardwicke, 2 Atk. 314; Lord Thurlow, 1 Bro. C. C. 188; 1 Ves. Jr. 286; Lord Alvanley, 5 Ves. 440; Lord Loughborough, 3 Ves. 99; Sir William Grant, 17 Ves. 479; Lord Kenyon, 3 T. R. 1337; *ib.* 595; the Court of King's Bench, 4 M. & S. 62, and the Supreme Court of North Carolina, 3 Bat. North Car. 438. I would speak with proper reserve concerning what has produced this distressing conflict of opinion and decision; but it seems to me to be going too far to attribute to a testator an intention to make distinct and different limitations, when he has signified no

such intention; but on the contrary has given over both species of property by the same words, as forming one subject, and to be affected by only one contingency.

3d. The particular language of this clause, in this rule, in my judgment, points strongly to a definite failure of issue. The testator makes no attempt to continue the whole property in the issue; for whether the estate of the first taker be held to be a fee simple or a fee tail, he has clearly limited over a fee; and it is not probable that his intent was that, in the event of both moieties being united in the survivor, he should hold one half in tail and the other half in fee.

The use of the words "other survivor" in this clause, taken in connection with the words "first decease," are also entitled to much weight. I am aware that there are many decisions that the word "survivor" means simply "other," and does not import a definite failure of issue. See Chancellor Kent's opinion in *Anderson v. Jackson*, 16 Johns, 418; *Doe v. Wainwright*, 5 T. R. 427; *Cole v. Sewell*, 2 Con. & Law. 344. But there are weighty authorities the other way, particularly in the State of New York. See *Jackson v. Chew*, 12 Wh. 153, and the New York cases cited above.

In this will the limitation over is not simply to the survivor, but to "the other survivor." To construe "survivor" here to mean simply "other," would deprive it of all force. It is to be observed, too, that it is only the share of him "who may first decease" which is given over. These words certainly add to the strength of the word survivor. That word naturally imports the one who shall be alive at the decease of the other. Here, then, the testator in describing the subject of the devise over, has called it the share of him who may first decease; and in describing the one who is to take, has used a word which indicates that he is to be alive when the estate goes over. It seems to me that the natural construction is, and the real meaning of this testator was, that if one of these sons should die without issue in the life time of the other, that other was to have the whole. If this contingency should not happen, the testator desired to make no further provision on the subject.

To declare this or any other construction of this clause to be free from doubt, or in entire harmony with all the authorities, would prove nothing but want of reflection or

examination. All I can venture to affirm is, that after deliberate and attentive consideration of the will, and of the rules of construction which seem to me applicable to it, the best opinion I have been able to form is that, by way of executory devise, the share of the son first dying without issue in the lifetime of the other, was to go over to that survivor, and that, subject to this contingency, each took a fee simple.

Rufus Choate and Sidney Bartlett, for plaintiffs; C. G. Loring and E. Merwin, for defendants.

The following opinion of the late Hon. JEREMIAH MASON, given in the year 1833, will be read with interest in connection with the foregoing decision.

OPINION.

I have considered the question proposed on the devise in the will of John Kittridge to his sons, John and Jacob, viz:—

1st. What kind of estate did John and Jacob take by the will?

2d. Was it an estate tail?

3d. If so, could either John or Jacob so dispose of it as to bar the heirs in tail?

4th. If an estate tail was given, does Jacob's part go to the daughter of Jacob, the son of Jacob the devisee, or to Thomas the oldest son of Jacob the devisee, now surviving?

The first clause of the devise giving the real estate with certain personal estate to the two sons, John and Jacob, without any limitation, and charged with the payment of debts and legacies, would create a fee simple by implication, were not this implication repelled by the next clause.

Such construction arises from the presumption that the testator intended a benefit to the devisees; which, if a life estate only was given, might fail or be defeated by their death, before the rents or income had equalled the amount of the charges.

But a life estate cannot be thus enlarged to a fee simple by construction against the manifest intention of the testator.

It is sufficiently apparent, from the subsequent clause, that such was not the intent of the testator in this case.

Besides a fee tail cannot by such charge alone be converted into a fee simple.

It has been held that such implication does not apply to a devise of a fee tail.

The second clause, I think, gives the two sons, John and Jacob, a fee tail general in their respective moieties, with cross remainders in fee simple.

It is obvious the dying without *any lawful heirs*, as used in this clause, must mean heirs of the body, as neither of the brothers could die without collateral heirs, while the other or his issue survived. The giving of the share of him who may first decease to the survivor and his heirs, must be construed to mean the share of the one *so dying without issue*. After giving each son a fee tail, it would be absurd to suppose the testator intended that the share of the one who should happen to decease first should go to the survivor in case the deceased son left issue.

Jacob, it is stated, died first in 1806, leaving issue, John, Jacob, Tho-

mas, and other children, having by deed of bargain and sale, dated 19th September, 1789, conveyed all that was devised to him to his brother John, to hold in fee simple.

John, the devisee, died in 1826, never having had issue, and by his will devised all his estate to a sister and niece.

John Kittridge, the oldest son of Jacob, the devisee, died in 1822, without issue. Jacob Kittridge, the next eldest son, died in 1831, leaving issue, one daughter. Thomas Kittridge, the next oldest son, is still living.

It was easy for John and Jacob, the devisees, to have destroyed the entailment by a common recovery, but is supposed no recovery was suffered, as none is stated.

By a statute of this State, 1791, chapter 60, a deed duly witnessed and for good, or valuable consideration and *bona fide*, destroys the entailment and bars the heir in tail.

But the deed from Jacob to John was dated in 1787, before the passing of that statute, and therefore cannot have such effect.

The deed was valid to pass the estate during the life of Jacob, and no longer; operating by force of the *statute of uses*, it created no discontinuance.

On his death in 1806, the moiety given him in tail went to his eldest son John.

On the death of John, the son, in 1822, without issue, it came to Jacob, the next eldest son, and on his death in 1831 it came to his daughter, she being his only child.

In case I am right in the opinion that the devise created cross remainders *in fee simple* on the death of John in 1826 without issue, the heirs of Jacob were entitled to his moiety.

District Court of the U. S. for the District of Massachusetts, Jan. 1855.

OLIVER YOUNGER v. GLOUCESTER MARINE, INS. CO.

Abandonment.

The master, as master, has no authority to abandon a vessel. There must be a legal authority to transfer the property to the underwriters; and this being the owners' right, the want of such authority is not supplied by any waiver on the part of the underwriters. The owner may ratify the master's abandonment, but it must be within such reasonable time as to give the underwriters the opportunity to decide early whether to accept or not, and if he does accept, the opportunity to make the best use he can of the wreck.

What is a reasonable time, considered.

If a vessel is abandoned and the underwriter takes possession, repairs and offers to return her, it is an acceptance of the abandonment by operation of law.

THIS was a suit in Admiralty on a policy of insurance on the schooner E. P. Howard. The vessel met with a disaster in the Gulf of St. Lawrence, and the master tele-

graphed to the insurance company, stating the nature of the injury, and adding, "I abandon the vessel to you, and wait your orders." This despatch bore date October 8th. On the 12th, the office replied, directing the master to strip the vessel and store the rigging and outfits, unless she could be sold for \$1000. This despatch was not received by the master, but in the latter part of October, having stripped the vessel and stored the rigging and outfits, he returned to Gloucester, where the owners lived, and there had several interviews with the directors of the company. The master was also a part owner, and was insured in his interest in the vessel, at the same office.

In the latter part of November, the office made a contract with four persons to go to the Gulf of St. Lawrence, and get off the vessel and bring her to Gloucester, for a certain sum if they succeeded, to have nothing if they failed. The contractors got the vessel off; and brought her to Gloucester in February. She was then repaired by the office, and on the 15th of March, the office tendered the vessel to the insured, asserting that the loss was less than fifty per cent. (deducting one-third new for old), and adding that a statement of the amount he would be required to pay would be presented. The insured refused to receive her, and claimed a total loss; and, on the 23d of March, the insured proposed to the office that the vessel should be sold by consent, without prejudice to either party, and the proceeds substituted for the vessel, in the litigation. This offer was refused. The insured then proceeded by libel in the Admiralty, and attached the vessel as the property of the respondents, upon which she was sold by order of the court.

The respondents contended, 1st, that a sufficient abandonment had not been made. 2d. That the injury was less than fifty per cent., deducting one-third new for old. 3d. That the vessel had been sufficiently repaired, within a reasonable time, and as the loss was partial, the insured was bound to take back the vessel.

The libellant contended, 1st, that if the abandonment was not sufficient, the respondents had waived the insufficiencies. 2d. That the loss was more than fifty per cent. 3d. That the offer to return was not made within a reasonable time, and that the vessel was not sufficiently repaired. 4th. That, whatever was the state of the facts in other respects, the acts of the respondents in taking possession of the

vessel, and repairing her, were conclusively, in law, an acceptance of the abandonment.

(There were other libels on policies upon the same vessel, depending on the same facts, and it was agreed that they should abide the decree in this cause, and that, in case of appeal, the facts found by the Judge of the District Court, should be taken as true in the Circuit Court, leaving open only the questions of law.)

SPRAGUE, J. In this case, two principal questions arise, depending partly on law and partly on facts, *first*, whether there has been an abandonment, and, *second*, whether the abandonment has been accepted.

I find it more convenient to consider the latter question first, viz.: if there has been an abandonment, has it been accepted?

The respondents took possession of the vessel and repaired her, and offered to return her to the owner, upon his paying a portion of the expenses of repairs, intending, no doubt, the one-third new for old, and perhaps a part of the expense of getting her off, as a general average claim. The libellant contends that this was an acceptance. The case of *Peele v. Merchants' Ins. Co.*, 3 Mason, 27, is a direct decision to the point, that if the vessel is abandoned and the underwriter takes possession, repairs and offers to return her, it is an acceptance of the abandonment, by operation of law, although he refuses in terms to accept it. The taking possession and repairing is an acceptance, notwithstanding the actual intention, or the declaration, to the contrary. This decision of the Circuit Court I adopt as binding on this Court.

In the State Courts of Massachusetts, the doctrine is that the underwriter may, after an abandonment, refuse to accept it, and take possession of the vessel and repair her, and if the loss is proved to have been less than fifty per cent., may return her to the former owner within a reasonable time. This doctrine is peculiar to Massachusetts. I believe it is not to be found anywhere else, either in the decisions of the Federal Courts, or in the State Courts of any other State, or in the law of England, or of the Continent of Europe. But the other principle is the law of the Courts of the United States, and of the other States of the Union.

The great controversy in this case therefore, is, whether there was an abandonment.

I am of opinion that the master, as master, has no authority to abandon the vessel. There must be a legal authority to transfer the property to the underwriters. It is urged that the acts of the insured are a waiver of the defects in the abandonment. The underwriter may waive informalities, and may waive his right to anything which he is entitled to have. For instance, he may waive a notice of the nature of the loss, or may waive an objection to want of reasonable time; and if he does acts which are justifiable only under an abandonment, he waives all such objections to its sufficiency. But here it is not the insurer's right, but the owner's right, that the person who makes the abandonment shall have authority to do so. The underwriters cannot waive the owner's right, and get property in the vessel without the owner's consent.

But an act by an agent may be subsequently ratified and confirmed by the principal. Has there been such a ratification here? There is no doubt that there has been an assent, at some time, as a demand for a total loss was made prior to the commencement of the suit. An abandonment must be in a reasonable time. This is a material right possessed by the underwriter. Must the ratification be governed by the same rule as to time with the original abandonment? The ordinary rule of the law of agency is, that the ratification may be made at any time. But is there not something peculiar in the case of an abandonment?

The reason why an abandonment is justified and held good in a case not actually one of total loss, is, that the underwriter may take the vessel and use her to the best advantage. Therefore, the insured should give the underwriter, at the earliest reasonable time, all the benefits in his power. Until a valid abandonment is made, the underwriter can exercise no act of ownership upon the vessel. Consequently, as the owner may ratify or not, at his pleasure, the act of the master, the question remains undecided in the interval; and if the owner shall refuse to ratify the abandonment, the acts of ownership exercised by the underwriter would be illegal. It is clear, therefore, that the ratification by the owner must be within such reasonable time, as to give the underwriter the opportunity to decide early whether to accept or not, and if he does accept, the opportunity to make the best use he can of the wreck. The same reason which requires the abandonment to be

made seasonably, requires the ratification of the act of assumed agency to be made seasonably. The owner is not obliged to abandon on mere rumor. He may wait a reasonable time to ascertain the actual state of things respecting the disaster. But he is not to wait in order to ascertain what his interests may be, in the state of the market, or as developed by subsequent events.

Was the ratification, in this case, made within a reasonable time? If we confine ourselves to the direct evidence, it has not been shown when the libellant first knew of the loss, and of the act of Howard. He does not appear in the case until the letter of the respondents to him, tendering him back his vessel. His reply to this letter, by his proctor, shows that he had claimed a total loss, and relied upon the abandonment. On the direct evidence, therefore, there is no proof of unreasonable delay. But the proper course of inquiry includes also the circumstantial proof.

It appears that, before the master's despatch, the news of the disaster had been communicated to the respondents by Mr. Tarr. They replied to him, authorizing him to get the vessel off, if possible, at their expense. They also authorized Captain Howard to strip the vessel and store the rigging and outfits, and to sell in a certain contingency. No act was done in consequence of these despatches, but this was not by reason of an invalidity in the abandonment. Late in October, Captain Howard returned, and Captain Reed and others returned, who had been at the place. Full inquiries were made of all these parties, and the respondents, as soon as they thought it expedient, made their contract with Reed and others to get off the vessel. She was got off, and brought to Gloucester in February. She was then repaired, and tendered to the former owners in March. The respondents do not complain that they were delayed at all in their action. On the contrary, they say that the vessel was got off, repaired and returned, within a reasonable time. There is nothing to indicate that they have not had all the advantages they could have had, if the abandonment by Howard had been authorized.

This series of acts by the underwriters shows that they treated the abandonment as valid. By the contract of insurance, the underwriter gets no property in the vessel, and no right of possession. It is a mere contract of pecuniary indemnification. He cannot interfere, and take control of the vessel, to prevent a loss, or to change the character of a

loss. His right to possession and control is derived solely from the abandonment. The owner keeps control of the vessel and of the wreck, until he chooses to abandon it to the insurer; and he need not abandon in any case unless he chooses to change the property in the remnants into money. Even under the doctrine of the Supreme Court of Massachusetts, the insurer cannot take possession and repair, until there has been an abandonment. No case has gone the length to assert such a right. One reason given by the Massachusetts Court for their rule, is, that the insurer may, by the repairs, show that the loss alleged to be over fifty per cent., was, in fact, less than that amount. This assumes that the owner has abandoned. The acts of the respondents in this case, can, under neither rule, be reconciled with any other view than that they considered the vessel sufficiently abandoned to them; and it seems that they had all the advantages of a valid abandonment. When both the insured and insurers have treated the abandonment as valid, an objection by the insurers to its original invalidity becomes little else than a formal objection.

I will now look at the acts of the owners, to see if they did not, in fact, make a seasonable ratification. The owners and underwriters, the master and most of the crew, and Mr. Tarr and Capt. Reed, all reside in Gloucester. It is not a very large place, and it is quite improbable that the owners did not know of the facts as they occurred. The vessel was brought to Gloucester — kept in the possession of the respondents some six weeks, undergoing such repairs as the respondents thought proper. The owners did not interfere, or object to any of these acts. The course of conduct on both sides can only be reconciled with one hypothesis; and that is, that each understood that the vessel was abandoned and a total loss claimed, and that the only question was, whether the facts were such as to justify it. After such an acquiescence, the owners would not be permitted to deny the authority of Howard, and treat the insurers as trespassers.

Since the decision of *Peele v. The Merchants' Insurance Company*, a clause has been introduced into the Boston policies, and is found in this policy in the following words: "The acts of the insured or insurers, in recovering, saving, and preserving the property insured, in case of disaster, shall not be considered as a waiver or acceptance of an abandonment." The respondents have referred to this

clause as justifying their acts. But the object of this clause is to enable either party, after an abandonment, to labor in rescuing and preserving property, without fear of the effect of their acts as evidence of an acceptance or waiver. The clause supposes an abandonment. The acts of the underwriters in getting off the vessel and bringing her to Gloucester, including temporary repairs for that purpose, might be protected by that clause of the policy. But they went much farther. Having brought the vessel to the home port, they kept possession of her for six weeks, and made repairs of a permanent character, confessedly for the purpose of tendering her back to the owners as a fully repaired vessel. These acts are not protected by the clause. Such seems to have been the view of this clause taken by the Supreme Court of Massachusetts. *Reynolds v. Ocean Insurance Company*, 1 Met. 160.

It is argued that the implied authority given to Captain Howard to sell, was only for the purpose of obviating the effect of a restriction specially introduced into this policy, in these words — “in case of loss in the Bay of St. Lawrence, no sale of the vessel to be made on their [insurers’] account,” and to leave the master to act as by the common maritime law. But the restriction is not on his right to sell as master on the owners’ account, but upon sales on the insurers’ account, after abandonment. A release from that clause authorizes a sale on the insurers’ account, and implies an abandonment. Moreover, the despatch is not confined to authorizing a sale. It gives orders, in answer to his request for orders, as to what shall be done with the vessel and her outfits, in case she is not sold.

There is another view that may be taken of this matter of the abandonment. Subsequent events, after an invalid abandonment, may justify a new one; as condemnation after capture, or new events altering the nature of the original loss. Now, I am by no means certain that, if there had been no valid abandonment before the insurers got off the vessel and brought her to Gloucester, their subsequent acts, which amounted to a conversion of the vessel to their own use, would not have justified a new original abandonment. The offer to return the vessel is accompanied by a claim upon the owner, for the payment of a sum of money to be afterwards ascertained. The letter of the libellant’s proctor treats this as a conditional offer. He desires to know what the amount is which his clients are required to

pay; saying, that if it is not too large, and if the vessel is found sufficiently repaired, they may, waiving no right, be willing to accept the vessel, as a compromise. The reply of the respondents does not waive this demand.

I am of opinion that there has been a sufficient abandonment, treating Captain Howard only as master. On this abandonment, the acts of the respondents are, in law, an acceptance. It is not, therefore, necessary to go into the other questions which have been opened.

On the point of jurisdiction, I consider the jurisdiction of the Admiralty over policies of insurance, to be the settled law and practice of this circuit. Decree for the libellant, for a total loss.

R. H. Dana, Jr., for the libellant; *S. Bartlett* and *F. C. Loring*, for the respondents.

New York Court of Appeals. Albany, December Term, 1854.

Present — GARDINER, Chief Judge; and DENIO, JOHNSON, RUGGLES, EDWARDS, PARKER, ALLEN, and SELDEN, Judges.

TUNIS M. SNEDEKER *et al.*, Respondents, v. WILLIAM E. WARING, Appellant.

Title to permanent erections or other fixtures placed by a mortgagor on the mortgaged premises — Statues — Sundials.

Permanent erections and other fixtures made by the mortgagor on the land mortgaged become a part of the realty, and are covered by the mortgage.

In determining between mortgagor and mortgagee, after a foreclosure and purchase, whether such erections and other fixtures are real or personal property, it is not considered as if it were a question arising between landlord and tenant, but it is governed by the rules applicable as between grantor and grantee.

Statues erected in the open air, as ornaments to grounds, may, under some circumstances, belong to the realty, though not attached to their foundations by clamps or cement, or other adhesive substance, and though capable of being removed without fracture.

In determining whether a statue so placed is real or personal property, it is proper to take into consideration its destination; that is to say, whether it was the intention of the proprietor, in its erection, to make it a permanent accession to the land; and such intention is not to be gathered from the declarations of the proprietor, but from the surrounding facts and circumstances.

A sculptor made a colossal statue of Washington, weighing three or four tons, and placed it in his door yard in front of his house, in the country, on a base made of masonry. The seams of the base were pointed with cement, though the stones of which it was composed were not laid in either cement or mortar. The base rested on an artificial and perma-

ment mound, raised for the purpose, two or three feet above the surrounding land, with a substantial stone foundation. The statue, the base and the house were all made of the same material, viz., red sandstone, and the statue and base had the appearance of being but a single block. The statue, as erected, was an appropriate and tasteful ornament for a country residence. *Held*, that the statue, though only attached to the base by its own weight, was not personal property, but belonged to the realty.

Held, also, that a sundial made of the same material, and appropriately placed for use in the same yard, and erected upon a solid and permanent stone foundation, belonged to the realty.

THE sculptor, Thom, famous for his groups of Tam O'Shanter, Old Mortality, &c., owned a farm in Rockland county, upon which he erected a house of red sandstone, having previously executed a mortgage of the farm. He then made a colossal statue of Washington, which, with its pedestal, was composed of one block of red sandstone, and weighed three or four tons. In front of his house, and between it and the highway, he raised a substantial and permanent mound about three feet above the level, by drawing in stones, earth, &c., on which he erected a base three feet and ten inches high. The base was square, and made of red sandstone, and the seams were pointed, though the stones were not laid in mortar or cement. The statue was placed upon this base, and was not attached except by its own weight. The structure was about twelve feet high.

He also constructed a sundial of the same material; its column, base and pedestal being all of one block, and three or four feet high, and placed it upon a flag stone which covered the well, between the statue and the house, and it was not fastened except by its own weight, which was about two hundred pounds.

The plaintiffs purchased the statue and sundial, as personal property, on a judgment and execution against Thom. The defendant purchased the farm at foreclosure sale under the mortgage, and claimed to hold the statue and sundial as fixtures. The plaintiff, after demand, brought this action to recover their value. The cause was tried before L. B. Strong, Justice, at the Rockland circuit, in December, 1849. The questions raised on the trial are sufficiently noticed in the opinion of the court. A motion for a nonsuit was made and denied, and the jury gave a verdict in favor of the plaintiff for \$1,625. A motion for a new trial was denied by the Supreme Court,

Justice Brown dissenting, and the defendant appealed to this court.

Charles H. Smith, for defendant.

A. Taber, for plaintiff.

PARKER, J. The facts in this case are undisputed, and it is a question of law whether the statue and sundial were real or personal property. The plaintiffs claim they are personal property, having purchased them as such under an execution against Thom. The defendant claims they are real property, having bought the farm on which they were erected at a foreclosure sale under a mortgage executed by Thom after their erection. The claim of the defendant under the mortgage sale is not impaired by the fact that the property in controversy was put on the place after the execution of the mortgage. *Corliss v. McLagin*, 29 Maine, 115; *Winslow v. Merchants' Ins. Co.* 4 Met. 306. Permanent erections and other improvements made by the mortgagor on the land mortgaged, became a part of the realty, and are covered by the mortgage.

In deciding whether the property in controversy was real or personal, it is not to be considered as if it were a question arising between landlord and tenant, but it is governed by the rules applicable between grantor and grantee. The doubt thrown upon this point by the case of *Taylor v. Townsend*, 8 Mass. 411, is entirely removed by the later authorities, which hold that, as to fixtures, the same rule prevails between mortgagor and mortgagee as between grantor and grantee. 15 Mass. 159; 4 Met. 306; 3 Edw. Ch. 246; 1 Hilliard on Mortgages, 294, note *f*, and cases there cited.

Governed then by the rule prevailing between grantor and grantee, if the statue and dial were fixtures, actual or constructive, they passed to the defendant as part of the realty.

No case has been found in either the English or American Courts deciding in what cases statuary placed in a house or in grounds shall be deemed real, and in what cases personal property. This question must therefore be determined upon principle. All will agree that statuary exposed for sale in a workshop, or wherever else it may be, before it shall be permanently placed, is personal property: nor will it be controverted that when statuary is placed upon a building, or so connected with it as to be considered a part

of it, it will be deemed real property, and pass with a deed of the land. But the doubt in this case arises from the peculiar position and character of this statue, it being in a court yard, before the house, on a base erected on an artificial mound raised for the purpose of supporting it. The statue was not fastened to the base by either clamps or cement, but it rested as firmly on it by its own weight, which was three or four tons, as if otherwise affixed to it. The base was of masonry, the seams being pointed with cement, though the stones were not laid in either cement or mortar; and the mound was an artificial and permanent erection, raised two or three feet above the surrounding land with a substantial stone foundation.

If the statue had been actually affixed to the base by cement, or clamps, or in any other manner, it would be conceded to be a fixture and to belong to the realty. But, as it was, it could have been removed without fracture to the base on which it rested. But is that circumstance controlling? A building of wood weighing even less than this statue, but resting on a substantial foundation of masonry, would have belonged to the realty. A thing may be as firmly affixed to the land by gravitation as by clamps or cement. Its character may depend much upon the object of its erection. Its destination — the intention of the person making the erection — often exercises a controlling influence, and its connection with the land is looked at principally for the purpose of ascertaining whether that intent was that the thing in question should retain its original chattel character, or whether it was designed to make it a permanent accession to the land.

By the civil law, columns, figures and statues used to spout water as fountains, were regarded as immovable or real. Pandects, Lib. 19, tit. 1, sec. 17, vol. 7, by Pothier, 107. Though it was inferred that statues resting upon a base of masonry were not immovable because they were there, not as part of the construction, but as ornaments. Corp. Jur. Civ., by Kreigel, lib. 19, tit. 1, sec. 17; Poth. Pand. 109; Burrill's Law Dict. "*Affixus*." But Labeo held the rule to be "*ea quæ perpetui usus causa, in ædificiis sunt, ædificii esse; quæ vero ad præsens, non esse ædificii*;" thus making the kind of property depend upon the question whether it was designed by the proprietor to be permanent or temporary, or as it was generally called by civilians, "its destination." Corp. Jur. Civ., by Kreigel, lib.

19, tit. 1, sec. 17. And Pothier says that when in the construction of a large vestibule or hall, niches are made, the statues attached (*attachées*) to these niches make part of the house, for they are placed there *ad integrandam domum*. They serve to complete that part of the house. Indeed, he says, the niches being made only to receive the statues, there will fail to be anything in the vestibule without the statues: and, he adds, it is of such statues that we must understand what Papinianus says: "*Sigilla et statuæ affixæ, instrumento domus non continentur, sed domus portio sunt.*" Pothier, de Communauté, sec. 56.

By the French law, statues placed in a niche made expressly to receive them, though they could be removed without fracture or deterioration, are immovable, or part of the realty. Code Nap., sec. 525. But statues standing on pedestals in houses, courtyards and gardens, retain their character of "movable," or personal. 3 Touillier, Droit Civil de France, 12. This has reference to statues only which do not stand on a substantial and permanent base, or separate pedestal made expressly for them. For where a statue is placed on a pedestal or base of masonry constructed expressly for it, it is governed by the same rule as when placed in a niche made expressly to receive it, and is immovable. 2 Répertoire Générale, Journal du Palais, by Ledru Rollin, 518, sec. 139. The statue in such case is regarded as making part of the same thing with the permanent base upon which it rests. The reasons for the French law upon this subject are stated by the same author, in the same work, on page 517, sec. 129, where the rule is laid down with regard to such ornaments as mirrors, pictures and statues, that the law will presume the proprietor intended them as immovable, when they cannot be taken away without fracture, or deterioration, or leaving a gap or vacancy. A statue is regarded as integral with the permanent base on which it rests, and which was erected expressly for it, when the removal of the statue will offend the eye by presenting before it a distasteful gap (*vide choquant*)—a foundation and base no longer appropriate or useful; Id. sec. 139. Things immovable by destination are said to be those objects movable in their nature, which, without being actually held to the ground, are destined to remain there perpetually attached for use, improvement or ornament. 2 Ledru Rollin, Répertoire Générale, 514, sec. 30.

I think the French law as applicable to statuary, is in accord-

ance with reason and justice. It effectuates the intention of the proprietor. No evidence could be received more satisfactory of the intent of the proprietor to make a statue a part of his realty, than the fact of his having prepared a niche or erected a permanent base of masonry expressly to receive it. And to remove a statue from its place under such circumstances, would produce as great an injury and do as much violence to the freehold, by leaving an unseemly and uncovered base, as it would have done, if torn rudely from a fastening by which it had been connected with the land. The mound and base in this case, though designed in connection with the statue as an ornament to the grounds, would, when deprived of the statue, become a most objectionable deformity.

There are circumstances in this case, not necessary under the French law, to indicate the intention to make the statue a permanent erection, but greatly strengthening the presumption of such intent. The base was made of red sandstone—the same material as the statue, giving to both the statue and base the appearance of being but a single block; and both were also of the same material as the house. The statue was thus peculiarly fitted as an ornament for the grounds in front of that particular house. It was also of colossal size, and was not adapted to any other destination than a permanent ornament to the realty. The design and location of the statue were in every respect appropriate, and in good taste, and in harmony with the surrounding objects and circumstances.

I lay entirely out of view, in this case, the fact that Thom testified that he intended to sell the statue when an opportunity should offer. His secret intention in that respect can have no legitimate bearing on the question. He clearly intended to make use of the statue to ornament his grounds, when he erected for it a permanent mound and base; and a purchaser had a right so to infer, and to be governed by the manifest and unmistakable evidences of intention. It was decided by the Court of Cassation, in France, in *Houelle v. Enregist*, 2 Ledru Rollin, Journal du Palais, Repertoire, &c., 214, that the destination which gives to movable objects an immovable character, results from facts and circumstances determined by the law itself; and could neither be established or taken away by the simple declarations of the proprietor, whether oral or written. There is as much reason in this rule as in that of the

Common Law, which deems every person to have intended the natural consequences of his own acts.

There is no good reason for calling the statue personal, because it was erected for ornament only, if it was clearly designed to be permanent. If Thom had erected a bower or summer-house of wicker-work, and had placed it on a permanent foundation in an appropriate place in front of his house, no one would doubt it belonged to the realty. And I think this statue as clearly belongs to the realty as a statue would, placed in the house, or as one of two statues placed on the gate-posts, at the entrance to the grounds. An ornamental monument in a cemetery is none the less real property because it is attached by its own weight alone to the foundation designed to give it a perpetual support.

It is said the statues and sphinxes of colossal size, which adorn the avenue leading to the temple of Karnak, at Thebes, are secured on their solid foundations only by their own weight. Yet that has been found sufficient to preserve many of them undisturbed for four thousand years, (Taylor's *Africa*, 113 *et seq.*); and if a traveller should purchase from Mehemet Ali the land on which those interesting ruins rest, it would seem quite absurd to hold that the deed did not cover the statues still standing, and to claim that they were the still unadministered personal assets of the Ptolemies, after an annexation of such long duration. No legal distinction can be made between the sphinxes of Thebes, and the statue of Thom. Both were erected for ornament, and the latter was as colossal in size and as firmly annexed to the land as the former, and by the same means.

I apprehend the question, whether the pyramids of Egypt or Cleopatra's needle are real or personal property, does not depend on the result of an inquiry, by the antiquarian, whether they were originally made to adhere to their foundations with wafers, or sealing-wax, or a handful of cement. It seems to me puerile to make the title to depend upon the use of such or of any other adhesive substances, when the great weight of the erection is a much stronger guaranty of permanence.

The sundial stands on a somewhat different footing from the statue. It was made for use as well as for ornament, and could not be useful except when firmly placed in the open air and in the light of the sun. Though it does

not appear that the stone on which it was placed was made expressly for it, it was appropriately located on a solid and durable foundation. There is good reason to believe it was designed to be a permanent fixture, because the material of which it was made was the same as that of the house and the statue, and because it was in every respect adapted to its place.

My conclusion is, that the facts in the cause called on the Judge at the Circuit to decide, as a matter of law, that the property was real, and to nonsuit the plaintiff; and if I am right in that conclusion, the judgment of the Supreme Court should be reversed, and a new trial ordered.

Gardiner, Ruggles, Edwards, Allen and Selden, J.J., concurred. Johnson and Denio, J.J., dissented, the former reading an opinion in favor of affirmance.

Judgment reversed.

Supreme Court of Vermont, Orleans County, April Term, 1854.

GEORGE ATKINSON v. WILLIAM BROOKS.

Rights of an indorsee of negotiable paper indorsed to him as collateral security for a pre-existing debt.

The indorsee of a bill of exchange as collateral security for a pre-existing debt is, *prima facie*, a holder for value, and so entitled to recover against an accommodation acceptor, not known to him to be such when the bill was taken by him.

THIS case was argued and held under advisement till the Circuit Term, at Montpelier, November, 1854, when the opinion was delivered by

REDFIELD, C. J. This case, as the defendant's testimony tended to prove, and as the jury seem to have found, in giving a verdict for defendant, was a bill of exchange, drawn by one Asa Low, at Bradford, Vermont, upon the defendant, at Sherbrooke, Canada East, payable to the order of the drawer, at the bank in Boston, Mass., three months from date, and being accepted and indorsed, was deposited with a firm of merchants in Boston, to raise money for Low, and remit to him at Bradford. But they, before its maturity, passed it to one of their creditors, as *security* for a note of some eleven hundred dollars, which they were owing them at the time, and which was overdue. The bill being dishonored, was

duly protested, and is sued, in the plaintiff's name, for the benefit of the house to whom it was passed, as security for their note. The defendant is merely an accommodation acceptor.

The important question in the case, is, whether the plaintiffs, in interest, can be regarded as holders for value. No question was made that they took the bill in good faith, and without knowledge even of the defendant, being merely an accommodation acceptor, or of any confidence between the parties of whom they took the bill, and any prior party. The inquiry seems naturally to resolve itself into two leading questions: —

1. Did the plaintiff, in fact, and upon principle, give value for the bill, and can he, upon this ground merely, be justly regarded as a *bonâ fide* holder for value? It seems now to be pretty generally conceded, that one who takes a note or bill endorsed while current, in payment and extinguishment of a pre-existing debt, must be regarded as a holder for value. This is certainly the general course of decision upon the subject, with some exceptions to be sure. And we do not well see how it can fairly be argued, that one who gives up a debt, and accepts a note or bill for the same, either on time or at sight, can be said to give no consideration for the same. He certainly does forego the pursuit of his own debt, and thus certainly puts himself, for the time, in a different, and in law, a worse, situation. And this must be regarded as, *prima facie*, a foregoing of some advantage by the indorsee, and also an accommodation to the indorser, who may fairly be presumed to prefer this mode of meeting his debt. The transaction, therefore, possesses both the cardinal ingredients which constitute the textbook definition of a valuable consideration; it is a detriment to the promisee and an advantage to the promisor. And it is no satisfactory answer to the case, to say, the party who takes such bill or note, which proves unproductive, is in the same condition he was before. This is by no means certain. He has, for the time, foregone the collection of his debt, and in such matters time is of the essence of the transaction. And the debtor thereby gains time — it may be more or less — but of necessity, some time is thereby gained; and in such matters, this is always accounted an advantage, and is often of the most vital consequence to the debtor. How then can it fairly be said, that this mere suspension of the debt, during the currency of the note or

bill, is no consideration? It seems to me such reasoning, upon other subjects, indeed upon any subject, where one is not pressed to the wall by the necessities of his case, would almost be regarded as frivolous. Surely, it is scarcely specious.

But it has often been claimed, that there is an essential difference in principle between taking a current note or bill in payment, and as security for a prior debt then due. The transactions are certainly different in form, at least. But, it seems to me, the ordinary case of taking such a security as payment, or as collateral to the prior debt, is the same in principle. One, whose debt is due, in the commercial world, must pay it instantly, or he becomes a bankrupt. If, instead of money, he gives a bill or note, either on time or at sight, whether this is in form, in payment, or collateral to his debt, he gains time, and saves the disgrace and ruin consequent upon stopping payment. And, in either case, there is an implied undertaking that he shall wait upon his debtor, till the result of the new security can be known; and in both cases, when that proves unproductive, the creditor may pursue his original debt, or he may sue the prior parties on the new security, except his immediate indorser, and sue him upon the original debt, or he may sue him as indorser, and also all prior parties. In this State, and in some other of the American States, where a note or bill, when taken as payment, *prima facie*, extinguishes the debt, it is more common to sue the debtor or indorser. But according to the English law, and the general commercial law, taking a current note or bill for a prior debt, only suspends the right of action, till the dishonor of the new security. According to the general commercial usage, there is, then, no essential difference in principle, whether a current note or bill is taken in payment or as collateral security for a prior debt, provided the note is, in both cases, truly and unqualifiedly negotiated, so as to impose upon the holder the obligation to conform to the general rules of the law merchant in enforcing payment. If, indeed, the note or bill is not so negotiated as to make the holder a party to it, or so as to require of him to pursue the strict rules of mercantile usage in making demand of payment and giving notice of dishonor, so as to charge his indorser, with all the prior parties, upon the peril of making the note or bill his own, in payment of his debt, then he could not be regarded, probably, as having so taken the paper, in the due course of

business, *bonâ fide*, and for value, as to shut out equitable defences existing between the original parties. But ordinarily, we suppose it fair to conclude, that one who takes a note or bill negotiated to him while current, although merely as collateral to a prior debt, is expected to pursue the same course in enforcing payment, as if he paid money for the bill. And it is scarcely supposable that one so taking security for a debt, will not conduct differently on account of the security. It is of necessity he should, if he puts any confidence in its ultimate availability. And one would scarcely part with such security, unless he expected more or less indulgence on account of it. And when the prior debt is suffered to remain uncollected, it is, under the circumstances, fair to conclude, such was the stipulation. And the case of one who takes a note or bill so negotiated, whether in *payment* or in *security* of a prior debt, implicitly stipulating to forego the collection until the maturity of the collateral paper, when such paper proves unproductive, is the same in *both alternatives*. In either case he may pursue his remedy upon the negotiable paper, against all the prior parties, including his immediate indorser, or omitting him, he may pursue the other parties to the bill or note, and sue his original debt equally, whether he took the paper in payment or as collateral security of such debt. So that the difference between the two cases is merely formal. And if, in case of negotiating current paper as collateral security for a prior debt, the holder is not regarded as having taken it upon a valuable consideration, then the indorser may recall it at will. For, if there is no such consideration as to make the contract binding, it is revocable at will. And if not upon consideration as to one party, neither is it as to the other. And in such case, the holder is merely the agent of the indorser for purposes of collection, and, as such agent, subject to his control, and bound to surrender the security at will. This was the view taken in *De La Chaumette v. The Bank of England*, 9 B. & C. 208. But that case turned upon the peculiar construction given to the facts of the case. Such is certainly not the common case of taking negotiable paper as collateral security for a debt already due. The indorser, in such case, can no more recall or control the paper than if he had received the money or goods in payment of the same. And when one takes a bill or note negotiated before maturity, in payment of money advanced or goods sold, such paper is, in fact, only collateral security

for the money or the price of the goods, and suspends such debts only till the dishonor of the bill, and is in law precisely the same thing as if the lender of the money or the vendor of the goods took a note for the money or goods, and a bill or note negotiated as collateral to such note, with the agreement to wait till such collateral was paid or dishonored. In all these cases, it would never be claimed, that the indorser of such bill or note could take it out of the hands of the indorsee at will. But this he clearly might do, if such indorsee had not taken it upon consideration. If, for instance, one holds a debt due six months hence, and his debtor, as a mere volunteer service, indorses a current note or bill as collateral security, the collateral being due in three months, it could not be made to appear that such transaction, before the indorsee had been at any pains in the matter, was a contract upon consideration. The prior debt not being due, the creditor could forego nothing, and the debtor receive no advantage from the transaction. And the agreement to apply the collateral upon a debt not yet due — being without consideration — would, probably, in the first instance, be revocable at will, and so, also, as long as the parties remained in the same situation. It seems needless to spend more time to show that, upon principle, and, in fact, one who having a debt due, accepts of his debtor, a current note or bill indorsed to himself as collateral security for the debt, with the understanding that indulgence is to be shown on the prior debt, which, in fact, follows, does take such paper upon consideration, and gives value. Upon careful examination of this matter, it seems strange that such a question should ever have been raised; and, it probably never would have been, but from the indefiniteness of the implied obligations growing out of such a transaction.

2. The more important question growing out of the case is, perhaps, what is the true commercial rule established upon this subject? And it is of vital importance in regard to commercial usages, that they should, as far as practicable, be uniform throughout the world. And such is necessarily the ultimate desideratum, and will inevitably be the final result. It is, therefore, always a question of time as to uniformity in such usages. The basis of such uniformity is convenience and justice combined. And until such rules become measurably settled by practice, they have to be treated as matters of fact, to be passed upon by juries;

and when the rule acquires the quality of uniformity and the character of general acceptance, it is then regarded as matter of law. It is thus that most of the commercial law has, from time to time, grown up. In the case of *Foster v. Pearson*, 1 C. M. & R. 849, Lord Lyndhurst, while Chief Baron of the Court of Exchequer, left it to the jury to determine upon the evidence as to general commercial usage in the city of London, whether the plaintiff had taken the bill in the due course of business, and the full court held that the question was properly submitted to the jury. But in this case, it seems to be recognized as settled law, that one who takes an indorsed note or bill still current, as collateral security for a prior debt, is a *bonâ fide* holder for value. So too, as early as 1814, in *Bosanquet v. Dudman*, 1 Stark. 1, Lord Ellenborough said, — “that whenever the acceptances exceed the cash balance, the plaintiff held all the collateral bills for value.” And the Court of Exchequer, in *Percival v. Frampton*, 2 C. M. & R. 180, decide the same point. Park, B. says: “If the note were given to the plaintiffs as a security for a previous debt, and they held it as such, they might be properly stated to be holders for valuable consideration.” This is in 1835. And the same rule is certainly recognized in *Heywood v. Watson*, 4 Bing. 496. So also in *Bosanquet v. Forster*, 9 C. & P. 659, and *Same v. Corser*, Ib. 664. *Palmer v. Richards*, is a full authority to show that it is not material whether the note or bill be deposited as security for an advance, or in payment, as some of the American cases seem to suppose [1851]. 1 Eng. Law and Eq. 529; 15 Jur. 51.

In *Smith v. Braine*, 3 Eng. Law and Eq. 379, the proper distinction between accommodation paper and paper fraudulently or illegally obtained or put in circulation, is discussed and placed upon the sensible and true ground, no doubt, viz. that in the former case, it is incumbent upon the maker or acceptor to show, that the holder took it without consideration, the law making the ordinary presumption in favor of the holder of accommodation paper, which is, in fact, made for the purpose of being put in circulation, and it being, therefore, fair to presume the holder took it for value and *bonâ fide*. But in case of a note or bill illegal in its inception, or fraudulently put in circulation, if these facts be proved in defence, it imposes upon the holder the necessity of proving in answer, that he gave value for the paper.

15 Jurist, 287. So also in *Mills v. Barber*, 1 M. & W. 425, it was long ago declared by Lord Abinger, that the courts in Westminster Hall had, upon consultation, determined so to decide the law. The same distinction between accommodation paper and paper fraudulently put in circulation, obtains in many of the American States. But this distinction is not, perhaps, very important here, inasmuch as the defendant claims both want of consideration for his acceptance and fraud in putting the paper in circulation. *Harvey v. Towers*, 4 Law and Eq. 531; 15 Jur. 544.

But that the English law is fully settled, in favor of the indorsee of current negotiable paper, who takes it as collateral security for a prior debt, there can, I think, be no doubt, since the decision of *Poirier v. Morris*, 20 Law and Eq. 103; 22 Law Journal [N. S.], Q. B. 313; 2 El. & Bl. 89, May, 1853, long since the present action was pending. This was an action upon a foreign bill which was negotiated to plaintiffs as security for a previous debt, and at the time of receipt passed to the credit of the debtor. It being dishonored, was protested, and, therefore, charged in account against the debtor to balance the former credit, with the addition of expenses. This would seem to be the usual course of doing business in Europe, and probably obtains to a considerable extent in the American cities, bills and notes being credited on receipt and charged upon dishonor, and all the collaterals being thus holden for the ultimate balance. This case was decided upon the general ground of the plaintiff's title at the time he took the bill as security for the balance of his account. Lord Campbell, C. J., in giving judgment, says: "There is nothing to make a difference between this and the common case, *where a bill is taken as security for a debt, and in that case an antecedent debt is a sufficient consideration.*" Crompton, J., says: "*Whether the bill was a collateral security, or whether it had the effect of suspending the payment of the antecedent debt, is quite immaterial.*" The plaintiffs had a perfect right to keep it." We think, therefore, it must be regarded as settled law in England at the present day, that such a bill or note taken as collateral security for a prior debt is taken in the due course of business and for value. Such being the settled rule of the English law, which is confessedly of great and paramount force upon a question of this kind, it is certainly desirable that, in regard to commercial law of such exten-

sive application in the every day transactions of business, the law of the American States should also be uniform, and, as far as reasonable and practicable, correspond with the acknowledged rule in other states and countries. The case of *Swift v. Tyson*, 16 Pet. U. S. Sup. Ct., upon the most elaborate examination and debate, adopts the English rule, and upon general grounds of settled commercial law. The decisions of the national tribunal are not indeed of any binding authority upon the general rules of the law merchant in a State Court, further than they commend themselves to our sense of reason and justice. But such a decision as that of *Swift v. Tyson*, upon such a subject, could scarcely fail to be regarded as of very considerable force, and, if sound in principle, would, almost of necessity, ultimately form the basis of that uniformity of commercial law in these states which, sooner or later, must, from its very great convenience, ultimately prevail. If not sound in principle, it would with difficulty be maintained even by that Court.

Aside from our former remarks, going, as we think, to show the soundness of the rule laid down in *Swift v. Tyson*, the course of decision in the several States since the date of that decision, show a general disposition to adopt it. Indeed, in many of the States a similar rule prevailed before that. In Pennsylvania, *Petrie v. Clark*, 11 Serg. & R. 377, [1824], recognizes fully the sufficiency of the consideration for the indorsement of a note or bill where it is taken in payment of a prior debt, and even as *collateral security*, if there is any agreement to wait on the prior debt, or any other damage is sustained in consequence, or the indorsee waives, or temporarily foregoes any of his other rights. This ground, assumed by Gibson, J., at that early day, is certainly a very near approach to the rule of *Swift v. Tyson*, and the present English rule upon the subject. The only difference seems to be, in not holding that one who takes such paper as collateral security, is presumed to conduct differently on account of it. *Walker v. Geisse*, 4 Wharton, 252, [Penn.], maintains very much the same ground.

In Maine, *Homes v. Smith*, 16 Maine 177, decides, that if such paper be taken in payment of a pre-existing debt, it defeats all equitable defences between the original parties. So also in New Hampshire, *Williams v. Little*, 11 N. H.

66. The decision in this case, that such paper being indorsed as collateral security for a loan made at the time, is not held for value, is certainly not justified by the decisions in any other State, so far as I can find. The New York Courts, who have resisted this rule with the most unflinching pertinacity, do not so hold, but the contrary. *Williams v. Smith*, 2 Hill, 301; *Watson v. Cabot Bank*, 5 Sanford, 423; *Carlisle v. Wishart*, 11 Ohio, 172, adopts the view of *Homes v. Smith*. *Blanchard v. Stevens*, 3 Cush. 162, holds the same. So, also, *Norton v. Waite*, 20 Maine, 175. So, too, *Bostwick v. Dodge*, 1 Douglass, [Michigan], 413. *Bush v. Peckard*, 3 Harrington, [Delaware], 385, goes to the same extent. So also the case of *Brush v. Scribner*, 11 Connecticut, 388. In none of these cases except *Williams v. Little*, did the question arise, whether taking a note or bill indorsed as collateral security for a prior debt, is the same as taking it in payment. There is, therefore, every reason to suppose that no such distinction will be attempted in any of those States, unless it be the latter State. The case of *Barney v. Earle*, 13 Alabama, 106, is to the same extent. In *Reddisk v. Jones*, 6 Iredell [North Carolina], 107, all distinction between taking negotiable paper in payment and as collateral security is repudiated, and both held to be valuable and sufficient considerations. In this case the paper was taken in payment, to be sure. So, also, in Georgia, *Gibson v. Conner*, 3 Kelly, 47, expressly decides, that taking such paper as collateral security for a prior debt, is sufficient to shut out equitable defences. So, also, in Indiana, *Valette v. Mason*, 1 Smith, 89. And the same is held in New Jersey, *Allaire v. Hartshorn*, 1 Zabriskie, 665; and in *Chicopee Bank v. Chapin*, 8 Met. 40, the same rule is recognized, although, there the debt was created at the time the paper was negotiated as collateral security. Thus, we think, most of the States may be regarded as virtually having adopted the rule laid down in *Swift v. Tyson*. Ch. Kent, too, 3 Com. 96, and note, adopts the same rule, "as the plainer and better doctrine;" and *Allen v. King*, 4 McLean, C. C. 128.

It is to be borne in mind, that upon the other side New York contends strenuously, that such paper, taken either in payment or as security for a prior debt, is not held upon any sufficient consideration to shut out equitable defences. I think the New York Courts are consistent and sound, in deny-

ing all distinction between taking such paper in payment and as security for a prior debt. There obviously is no difference in regard to the consideration. But, even in New York, they have felt compelled to decide, that if such paper is taken in payment of a prior debt, being indorsed *without recourse*, the holder acquires perfect title, and may shut out equitable defences between the original parties. *Bank of St. Albans v. Gilliland*, 23 Wendell, 311. And if one gives his own note for such paper, it makes him a holder for value even in New York. 4 Barb. S. C., 304. These two cases seem very much like an abandonment of the principle of the rule even there. In Kentucky, too, a similar rule to that in New York has prevailed. *Breckinridge v. Moore*, 3 B. Monroe, 629. It is claimed, too, that Virginia adopts the same ground, in *Prentice v. Zane*, 2 Grattan, 262; but that case does not decide the point, a new trial being awarded for defect in the special verdict. Similar decisions have been made in Tennessee. In *Wormly v. Lowry*, 1 Humphrey, 468, Greene, J. says: "Where one receives a note for a pre-existing debt, he parts with nothing. He is in the same situation after a successful defence by the maker, that he was before he took the note." This is certainly a remarkable instance of the *non sequitur*, to have imposed any delusion upon the mind of an experienced judge. He is in the same situation! But how can that be made to appear? He has let the collection of his debt or its security surcease for the time, and time is often fatal in such matters, and has incurred the expense and vexation of litigation, and is still in the same situation! Surely he is, in one respect; his debt is still unpaid: and in another also, which is somewhat important, — he is again out of court. And it seems to me, that all refinements upon such absurd premises are always liable to involve one in similar contradictions and incomprehensible conclusions. I certainly feel no disposition to deal harshly or in a vainglorious spirit with the general argument upon which this view is attempted to be maintained. It will be found ably stated by Walworth, Chancellor, in *Stalker v. McDonald*, 6 Hill, 93.

This embraces most of the decisions upon the subject, both in this country and in England. And we could scarcely question, that the decided and increasing preponderance is in favor of the plaintiff's claim to hold the bill free from all equities of the acceptor; and coinciding as

it does with our views of the reason and justice of the case, we could not hesitate to adopt it. We might, probably, have decided the case upon the Massachusetts law, as the contract seems, upon its face, to have been made with reference to that place. But as this question was not made in the court below, it does not properly arise here, probably. And we have chosen to put the case upon the general rule of the law merchant, the ordinary presumption being, that the law of any particular place, in regard to commercial contracts, conforms to the general law, unless the contrary be shown. The party who claims the benefit of the law of a particular place, on the ground of it being different from the general rule of law on that subject, must prove the law of that place to be different, as he would prove any other fact in the case. This leaves that question open.

We do not understand the plaintiff to claim seriously, that he can recover the balance of this bill above the amount of the note which was due at the time of the negotiation of the bill, and as security for which it was negotiated. We do not see how he could claim that. The valuable consideration must be limited to the amount of the prior debt due at the time of the negotiation of the bill.

1. A note or bill negotiated in security for a debt not yet due, is not upon sufficient consideration, ordinarily, unless the creditor wait in faith of the collateral after his debt becomes due.

2. If the debtor is notoriously insolvent before the note or bill is negotiated as collateral security, it is said the creditor can only stand upon the rights of his debtor.

3. If a note or bill is taken merely to collect for the debtor, to apply when collected, the creditor not becoming a party by indorsement, so as to be bound to pursue the rules of the law merchant in making demand of payment and giving notice back, the holder is merely the agent of the owner. *De La Chaumete v. Bank of England, supra. Allen v. King*, 4 McLean, C. C. 128.

4. So, too, probably, if it were shown positively that the holder gave no credit to the indorsed bill, and did, in no sense, conduct differently on that account, he could not be regarded as a holder for value.

These four exceptions are probably based upon good sense, and may be found sustained by authority, but we have no occasion to say more in regard to them here. This case stands upon the general broad ground, of paper taken in the

due course of business as collateral security for a debt due, and, *prima facie*, the holder is under such circumstances to be regarded as holding the paper for a valuable consideration, and so entitled to recover against an accommodation acceptor.

Judgment reversed.

Recent English Decision.

Common Bench. Saturday, November 4, 1854.

BABONEAU v. FARRELL.

Slander — Words not per se actionable — Innuendo — Privileged communication — Practice.

In an action for slander, where the words laid are not actionable, except in their alleged meaning, but are injurious to the plaintiff in his calling or business, it is unnecessary to ask the jury whether the words used were spoken in the sense imputed to them by the innuendo. It is enough to ask them whether the words were proved.

Unless the point of "privileged communication" be taken at the trial, it will not be entertained on a rule for a misdirection.

THE declaration stated that the plaintiff, before, &c., carried on the business of a manufacturer of asphalte, under the name of Baboneau and Company. That he had been employed in the way of his said trade by the Board of Ordnance, to relay the asphalte portion of the entrance of the Ordnance-office, Pall Mall, with new asphalte, and the plaintiff had duly performed the said work. Yet the defendant, well knowing the premises, falsely and maliciously spoke and published of the plaintiff in his said trade, and of the plaintiff in reference to the said work so executed by him as aforesaid, the words following, &c. "The old materials have been relaid by your (meaning the plaintiff's) company, in the asphalte work executed in front of the Ordnance-office, Pall Mall (meaning the said work so executed by the plaintiff for the Board of Ordnance as aforesaid), and I (meaning the defendant) have seen the work done. Thereby meaning that the plaintiff had been guilty of dishonesty in the conduct of his said trade, by laying down again the old asphalte materials which had before

been used at the entrance of the said Ordnance-office, instead of new asphalte, according to his said contract.

Plea — Not guilty.

This action was tried before JERVIS, C. J., at the sittings in Guildhall after last term, and a verdict found for the plaintiff, with 40s. damages. In his summing-up, the learned Judge told the jury — “The words are proved, and are certainly calculated to do the plaintiff an injury in his business.”

J. H. Hodgson now moved to arrest the judgment herein and for a new trial, on the ground of misdirection. The words *per se* were not actionable; and both the words and their alleged meaning were in issue under not guilty. The meaning imputed to the words in the innuendo is too large for the words. It could only be true where the defendant knew what was the actual contract between the plaintiff and the Board of Ordnance; and there was no evidence of that. The learned judge in summing-up should have directed the jury to say whether the defendant had used the words in the sense imputed to them in the innuendo. [JERVIS, C. J. — If I had put to the jury to say whether, when the defendant used the words, he was aware of the terms of the contract between the plaintiff and the Board of Ordnance, the other side would naturally object that I had no right so to put the case to the jury.] The words were furthermore spoken under circumstances which made them a privileged communication.

JERVIS, C. J. — That point was not raised at the trial. If it had been, I should have put it to the jury to say whether there was express malice. It is now too late to raise the point.

By the COURT. — We think it was not necessary to ask the jury whether the words used were spoken in the sense imputed to them in the declaration; therefore there will be no rule. Rule refused. — *Law Times Reports*.

Abstracts of Recent American Decisions.

[Selections from the Index to Foster's (N. H.) Reports.

Award. If referees do not award costs of court, they will not be allowed. — *Chapin v. Boody*, 282.

Courts of equity will interfere and set aside an award of arbitrators, whenever such manifest and palpable injustice is done as to show fraud, misconduct, or evident mistake on the part of the arbitrators. — *Tracy v. Herrick*, 381.

Courts of law will set aside a report in cases where a return is by law made to the court, if corruption, partiality, gross mistake, or evident misconduct shall appear. — *lb.*

An award will not be set aside for subtle and technical exceptions; and if the court are satisfied that the award has been fairly made, they will endeavor to sustain it as far as may be, and all matters connected with it will receive a fair and liberal construction. — *lb.*

An award which would be defective on account of irregularity in the meetings of the arbitrators, will be made good by an agreement of the parties that such irregular meetings shall take place. — *lb.*

If a submission to arbitrators provide that the award shall be made and set down in writing, indented, and ready to be delivered to the parties, but the parties afterwards agree that the award shall be left in the possession of one of the arbitrators, for the benefit of all the parties, and it be so done, the award will be good. — *lb.*

It seems that if true copies of an award be delivered to the parties, and be received by them without objection, it will be sufficient. — *lb.*

An award embracing matters not within the submission, but so made that those actually submitted are decided and can be enforced, is void only so far as it exceeds the submission. — *lb.*

Where the parties were partners, and took a contract of a corporation to do certain work, and were unable to agree among themselves as to the settlement of the same, and submitted the contract and settlement to arbitrators, who awarded the sums due each, and also awarded that one of the parties should draw the money and close the business — *Held*, that the arbitrators did not exceed the submission. — *lb.*

Bankruptcy. Under the bankrupt act of 1841, only those creditors who have proved their debts are entitled to notice, personally, or by letter, of the application for a discharge and certificate. A replication to a plea of discharge under the bankrupt law, which alleges merely that the plaintiff was a creditor and his residence known, and that he was not notified of the filing of the application for the discharge, is insufficient. It should allege that he was a creditor, and had proved his debt. — *Morse v. Presby*, 299.

The powers of the district courts, in relation to bankruptcy, are special and summary, and their jurisdiction must be shown. — *lb.*

Burden of Proof. An admission, upon another part of the record, of the facts necessary to enable the plaintiff to maintain the issue he is bound to prove, does not change the burden of proof. — *Buzzell v. Snell*, 473.

If the defendant relies upon payment as a defence, either upon the general issue or a special plea, the burden rests upon him to prove payment; but the affirmative of the issue is upon the plaintiff, upon the general issue, while it is upon the defendant, under the special plea. — *lb.*

Contract. Mere inadequacy of price, independent of other circum-

stances, is not of itself sufficient to set aside a transaction.— *Powers v. Hale*, 145.

But it may induce the court to stay the exercise of its power to enforce the specific performance of a contract for the sale of land.— *Ib.*

The court will not decree the specific performance of a contract to convey land, where there is any misrepresentation of the condition or value of the property.— *Ib.*

The plaintiff, having ascertained that persons living in the vicinity of the defendant's land would give a certain price for it, anticipated them, and procured from the defendant a bond, conditioned for the conveyance of the land upon the payment of the plaintiff's note for seventy-five dollars, which was a much less sum than he had reason to suppose others would give for it. The defendant was unacquainted with the condition and value of the land, which the plaintiff represented to be of little value, and the information he had procured concerning the price he did not communicate to the defendant. The plaintiff afterwards contracted to sell one of the lots for \$62.50, and was offered \$100 for the other— *Held*, that a bill for the specific performance of the defendant's contract could not be sustained.— *Ib.*

Covenant. In an action for the breach of the covenants of seizin, of good right to convey, of quiet enjoyment, and of warranty, contained in a conveyance of land, the damages cannot exceed the amount of the consideration and interest, with the costs of the suit attending the eviction.— *Willson v. Willson*, 229.

Neither the increased value of the land, by reason of a rise in its price, or of improvements made upon it, can be recovered in an action upon either of these covenants.— *Ib.*

In an action on the covenant against incumbrances, the general rule is, that the measure of damages is the sum paid to remove the incumbrance, with compensation for the grantee's trouble and expenses.— *Ib.*

Whether the grantee can, in any case, recover more than the consideration and interest, *quære*?

If the incumbrance is still contingent, and the plaintiff has sustained no actual injury, he can recover only nominal damages.— *Ib.*

It seems that if the covenantee cannot remove the incumbrance, he may recover damages for the injury he has sustained.— *Ib.*

It seems that where the incumbrance is changed into an indefeasible title, the plaintiff can recover the money he has paid for the land, with interest.— *Ib.*

A default admits the cause of action, and the material and traversable averments to the declaration, but not the amount of damages.— *Ib.*

After a default in an action of covenant, the defendant may introduce evidence tending to prove an adjustment or payment of the damages.— *Ib.*

Custom. Proof of usage or custom is admissible to ascertain the nature and extent of a contract, in the absence of express stipulations.— *Swamscot Machine Co. v. Partridge*, 369.

So where the language of a contract is equivocal, or is susceptible of more than one meaning or construction, or has various senses, usage or custom may be resorted to to show what was the real intention of the parties.— *Ib.*

But it is no part of the legitimate purpose of such proof to vary or control the plain meaning and intention of the contract, as shown by the language of it, where the language has a plain, unmistakable, and unequivocal meaning.— *Ib.*

Accordingly, where an insurance company promised the assured that their directors "shall settle and pay (to him) all losses within three

months after notice shall have been given as aforesaid," "and that the payment of the loss ascertained shall be made within the time prescribed by the charter, without deduction from the sum decreed by the adjustment," it was holden that proof of a custom or usage on the part of the company, in case of a total loss, to retain of the amount of the ascertained loss, two per cent. per month on the balance of the premium note, from the date of the last assessment upon it, until the expiration of the term of the policy, was inadmissible, the effect being to limit and control the clear and unequivocal terms of an express contract. — *Ib.*

Damages. The owner of land, at the time of the trespass committed upon it, is entitled to the damages that may be recovered in an action of trespass, commenced by him for the purpose, and not a subsequent grantee of the land, who may own it at the date of the litigation. — *Furbush v. Goodwin*, 425.

Deed. A deed conveying land by a description, which includes an entire tract, will be restricted to an undivided half, by a clause in this form, "meaning to convey all the land I purchased of B., set forth in his deed, recorded," &c., if that deed conveys but an undivided half. — *Flagg v. Bean*, 49.

So, if in such case the deed referred to did not include a parcel embraced in the description of the subsequent deed, such parcel will not pass. — *Ib.*

A deed by a husband, of land of his wife, purporting to convey a fee, passes only his estate for life. — *Ib.*

If the wife, by a separate clause, release her right of dower in the same land, nothing passes from her to the grantee. — *Ib.*

The description of the premises demanded in a real action, will not be aided, or enlarged, or restricted, by a reference to any other instrument. — *Ib.*

A quitclaim deed, by a mortgagee, of all his right and title in the land mortgaged, of which he has never been in possession, will pass no interest in the debt secured by the mortgage, and, consequently, none in the land mortgaged. — *Furbush v. Goodwin*, 425.

A deed will take effect according to the legal interpretation and meaning of the terms of it, and not according to the erroneous impressions of the parties as to its operation. — *Ib.*

Accordingly, where a quitclaim deed, purporting to convey his interest in the land, was executed by the mortgagee, and the consideration expressed in the deed was paid for the mortgage interest, and the parties to the deed, at the time, believed that the interest of the mortgagee in the mortgage and mortgage debt would pass by the deed; it was held, that the deed was, nevertheless, insufficient to pass any interest in the debt, or in the land mortgaged. — *Ib.*

Evidence. The testimony of a witness who has seen a person write but once, is competent to be submitted to a jury to prove his handwriting. — *Bquman v. Sanborn*, 87.

If a witness has knowledge of a person's handwriting, which has been derived from having seen his signatures or writings in transacting business with him, so that the papers have been acted upon and recognized as genuine by the individual, he may give his opinion as to the handwriting. Or, if his knowledge has been acquired by an intimate acquaintance with signatures which have been adopted into the ordinary business transactions of life, he may also give his opinion. — *Ib.*

It is competent for an expert to make a comparison between papers already in evidence in the cause, and whose genuineness is not contested, and the handwriting in dispute, and give his opinion in regard to the same;

and this, before any evidence of belief founded upon knowledge is produced. A jury may also make a comparison in like cases. — *Ib.*

It is not the practice in this State to permit specimens of handwriting contained in documents irrelevant to the issue, to be introduced for the purpose of making a comparison, until after some evidence of belief founded upon knowledge has been laid before the jury. But after evidence founded upon knowledge has been introduced, specimens, whose genuineness is not in dispute, may be submitted for the purpose of a comparison. — *Ib.*

Notarial copies of instruments, duly certified and authenticated, the originals of which, by the laws of the country where they are executed, are not within the power of the party to produce, are admissible as secondary evidence. — *Ib.*

The feelings and temper of a witness towards a party, are proper subjects of inquiry, and if he denies any hostility, he may be contradicted by other witnesses. — *Folsom v. Brown*, 114.

Writings purporting to contain a part only of a contract, as notes, receipts, bills of sale and the like, will not exclude parol evidence of other collateral parts of the contract. — *Webster v. Hodgkins*, 128.

Evidence showing that a witness had made statements substantially different from those he now makes, and inconsistent with them, in regard to material matters, is admissible to affect his credit. — *Martin v. Farnham*, 195.

Statements made by a witness relative to his state of feeling towards a party, are regarded as material, and may be so contradicted. — *Ib.*

The evidence of a party to the suit, that an original paper is in the hands of the adverse party, is sufficient to admit secondary evidence. — *Neally v. Greenough*, 325.

Notice to produce an original paper is not required, where the form of the action or of the pleadings is such as to give notice that its production will be necessary to contradict the secondary proof of the other side, if incorrect. — *Ib.*

Nor where the party has obtained possession of the paper by fraud. — *Ib.*

An express admission of the justice of a claim, of the grounds of which the party is fully aware, is evidence of every fact necessary to support that claim. — *Ib.*

An implied admission of the same kind is evidence, more or less strong, to the same points.

It is a well settled principle of law, that a receipt may be explained by parol evidence, and its true meaning and purpose shown, although the same may not be in accordance with the obvious import of its provisions, and in effect, in that way, the terms of the written instrument may be varied, explained, limited, and controlled by parol evidence. — *Furbush v. Goodwin*, 425.

The statement of a party to a receipt, in a deposition, of what was the "true intent and meaning of the receipt," as understood by him "at the time" of executing it, is, in explanation of it, competent evidence as tending to show the real intention and purpose of the parties in the transaction. — *Ib.*

The rule of law excluding parol evidence, offered for the purpose of adding to, explaining, varying, controlling, or limiting the terms of a written contract, applies only in a case where the contract to be explained is between the parties to the suit, and not where it is between other parties. — *Ib.*

And it is equally inapplicable in a case where one only of the parties to the contract is a party to the action. — *Ib.*

So where a contract has been reduced to writing, between persons not parties to the litigation, or one of whom only is a party to the action in which the written contract is given in evidence, the same may be explained by parol evidence; and it may be shown that more and other contracts were entered into between the same parties in connection with, or in addition to, the written contract. — *Ib.*

It is a well settled rule of law, that in order to render parol evidence admissible, for the purpose of proving the contents of a written contract, or other writing, the absence or non-production of the contract or writing must be legally accounted for. — *Ib.*

The payee of a note, who indorses it without recourse, is a competent witness for an indorsee in an action upon the note against the maker. — *Edgerly v. Shaw*, 514.

Infancy. To sustain the issue of a new promise upon a plea of infancy, a more stringent rule prevails than where the defence is the statute of limitations. There must be either an express ratification by a new promise made, or such acts of the individual, after becoming of age, as to amount to an unequivocal ratification and promise. — *Tibbets v. Gerrish*, 41.

An infant, who has avoided his contract for labor on the ground of infancy, may recover compensation for his services performed under it. — *Luskin v. Mayall*, 82.

A person, after he becomes of age, may ratify his promissory note, made during infancy, by a promise to pay it in labor, in a specified time, or else in money.

After the time has expired, the promise to pay in money will be an absolute ratification of the note. — *Edgerly v. Shaw*, 514.

The defendant, during infancy, made a promissory note, payable to one Barker, or order, and by him indorsed to the plaintiff. Before Barker transferred the note, the defendant promised him that at the end of six weeks he would come and work for him at a dollar a day, or else he would pay him in money. He did not work for Barker according to his promise — *Held*, that the promise to pay Barker in money was a ratification of the note, and that the indorsee might avail himself of it in an action. — *Ib.*

Insurance. If a policy issued by a mutual fire insurance company provides that the insurance, in case of a loss, shall be paid to a third person, the action to recover the loss should be in the name of the party to the policy, who gives the premium note, and thereby becomes a member of the company. — *Ib.*

The interest of the assured in the property at risk, need not be a legal one. A mere equitable title or any qualified property in the thing insured, may be legally protected by insurance. — *Goodall v. New England M. F. Ins. Co.* 169.

A trustee who has no personal interest in the property may get the same insured in his own name; and an agent or factor who has the custody of goods for sale on commission, may insure them. — *Ib.*

Where the agent of a manufacturing company applied for insurance on the building and machinery belonging to the company, and the insurers issued to him a policy, and therein promised to insure him, his successors and assigns, on the property of the company, and to pay or satisfy him, his successors or assigns, the sum insured — *Held*, that in case of loss a suit might be maintained by the agent for the recovery of the whole amount lost. — *Ib.*

Where the charter of an insurance company provided that if any other insurance should be obtained on any property insured in that company, notice should be given to the secretary and the consent of the directors obtained, otherwise the policy should be void; and the evidence tended to

show that the secretary knew of and advised to the second insurance, and that the directors verbally consented to the same — *Held*, that written notice and consent were not necessary, and that the evidence was competent to show both notice and consent. — *Ib.*

The testimony of one of the directors of an insurance company as to the practice in giving consent in cases of second insurance, so far as the same came to his knowledge, is incompetent to establish any custom of the company that shall bind the assured, he being ignorant of the practice. — *Ib.*

It is not necessary that a policy be actually issued by an insurance company in order to bind the company. The risk commences from the time of the approval of the application and the payment or security of the premium. And where the secretary of a company gave to the applicant a certificate that the directors consented that a policy already issued might cover other property than that originally insured — *Held*, that the certificate was evidence of a contract for insurance upon such other property. — *Ib.*

The act incorporating a mutual fire insurance company, provided that upon an alienation of the property insured, the policy should become void, unless it was assigned to the alienee with the assent of the company — *Held*, that a mortgage was not an alienation, within the meaning of this provision. — *Rollins v. Columbian M. F. Ins. Co.*, 200.

The same act contained the usual grant of power to make all necessary and convenient by-laws for managing the business of the corporation — *Held*, that a by-law was valid which provided that the mortgagee, in any case, having the policy assigned to him, might have the same ratified and confirmed to him, for his benefit, by consent of the directors, and giving security to their satisfaction, and that in such case he should be entitled to all the privileges and incur all the liabilities of the institution, equally with other members. — *Ib.*

Held, also, that where there was an assignment according to this by-law, the action, in case of a loss, must be in the name of the assignee. — *Ib.*

Where a policy, issued by such a company, is assigned without an assignment or other conveyance of the property insured, no action can be maintained on the policy in the name of the assignee. — *Ib.*

Where the defendants insured property that was mortgaged, and by a memorandum upon the policy, agreed to pay the amount of the insurance to the mortgagee, in case of loss, with the consent of the mortgagor, and the mortgage was afterwards foreclosed, without any act of the mortgagor, to whom the policy was issued — *Held*, that the foreclosure did not work an alienation of the property so as to defeat the policy, and that an action for the loss might be maintained in the name of the assured. — *Bragg v. New England M. F. Ins. Co.*, 289.

Notwithstanding there has been a total loss by fire, of the property insured by a mutual fire insurance company, the assured will be liable for the payment of all assessments made upon the premium note, for his just proportion of all losses sustained by the company during the entire period mentioned in the policy of insurance, as well after as before the loss occurred. — *Swamscot Machine Co. v. Partridge*, 369.

An insurance company, summoned as the trustee of the assured, is entitled to retain, out of the sum of their indebtedness to the assured, the amount of all such sums as may have been properly assessed upon the premium note of the principal debtor, as his just proportion of the losses sustained by the company at any time prior to the time of the disclosure. — *Ib.*

In an action brought by the assured to recover a loss by fire, the assured

is entitled to interest, by way of damages, for the wrongful detention of the amount due him, beyond the time prescribed by the provisions of the policy, as affected by the charter and by-laws for its payment. — *Ib.*

Juror. The affidavits of jurors are not admissible to show their impressions as to the effect of their verdict upon the costs in the suit; nor to show the consultations that took place in the jury-room, or the motives, inducements or principles upon which they founded their verdict. — *Folsom v. Brown*, 114.

Legacy. Where a testator gave to his married daughter several shares in certain corporations, "to hold to her and her heirs forever" — *Held*, that the bequest was absolute, and that the husband might reduce the same to possession. — *Wells v. Tyler*, 340.

A legacy to a wife does not vest absolutely in the husband. He has a right to reduce it to possession, or to permit her to hold it to her separate use. If he does not exercise his rights over it, it survives to her in case of his death. If he survives her, he is entitled to administration, and to recover it to his own use. — *Ib.*

Money Had and Received. A note, payable in specific articles, cannot be recovered upon a count for money had and received. But it may be declared upon specially, as upon a negotiable cash note. — *Tibbets v. Gerish*, 41.

If B. give to C. a lease of his farm for three years for the rent of \$450, paid in advance, subject to be terminated by B., on giving notice to quit, and at the end of the first year C. quits, on receiving notice therefor, an action for money had and received can be maintained against B. for the amount in his hands for the unexpired term. — *Jones v. Woodman*, 311.

Where A. purchased a farm, subject to a lease from B., the grantor, to C., which had two years to run, but which could be terminated by the lessor or his assigns on notice, and for which two years C. had paid B. \$300, and at the time of the conveyance of the farm the lease was assigned to A., without consideration paid by him, and he afterwards terminated the lease by notice to C. — *Held*, that in taking the deed and lease, A. assumed the position of B., the grantor, and that a jury might infer from the facts, that \$300 were placed in the hands of A. for C., with his agreement, and that an action for money had and received might be maintained therefor by C. — *Ib.*

Mortgage. In this State, nothing more is necessary to discharge the interest of a mortgagee, and re-vest the estate fully in the mortgagor, than the payment of the debt, or the performance of the duty, the payment or performance of which the mortgage was intended to secure. — *Furbush v. Goodwin*, 425.

Where several persons became the assignees of a mortgage, and each of them severally paid his money for himself, so far as his portion was concerned, and the assignment was made to them, specifying the share or interest of each therein; it was *held*, that a payment by the mortgagor to one of the assignees, of the amount of his share as specified therein, would discharge and extinguish all his right and interest in the mortgage, and that his subsequent assignment alone would pass nothing. — *Ib.*

The interest of a mortgagee, for the purpose of a sale, is merely a chattel interest, and will pass only by the sale and transfer of the debt, so long as the mortgagee asserts no claim to the land mortgaged, by an entry thereon, or by any other method of enforcing the mortgage. — *Ib.*

Officer. An officer may allow reasonable liberties to a debtor in custody, and, as between him and the debtor, the latter cannot complain, provided there be no abandonment of the arrest. — *Butler v. Washburn*, 251.

After an arrest which requires the prisoner to be committed, it is the duty of the officer to take the prisoner to jail as soon as he reasonably can. He is to judge of the hour at which he will start, and of the propriety of starting on account of the state of the weather, and of the personal restraint necessary to secure the prisoner. And he is not liable to the prisoner for any injury he may receive thereby, unless he needlessly exposes the prisoner's health, or does him an unnecessary personal injury. — *lb.*

Promissory Note. A note payable in specific articles is not negotiable. It is, however, a contract capable of being assigned, and an equitable interest becomes vested in the assignee, sufficient to enable him to maintain a suit in the name of the assignor. A suit may also be maintained in the name of the assignee, if, after the assignment, there is an express promise to pay the assignee. — *Tibbets v. Gerrish*, 41.

Slander. In actions of slander, imputing to the plaintiff crime, it is not necessary that a plea or brief statement justifying the words should be sustained by the same evidence as would be requisite to convict the plaintiff on an indictment for the crime. The rule of evidence in such cases is the same as in other civil actions. — *Folsom v. Brawn*, 114.

Rumors and general reports are not evidence in actions of slander, even in mitigation of damages. — *Dame v. Kenney*, 318.

Evidence of a plaintiff's good character is inadmissible, unless to repel an attack upon it. — *lb.*

A defendant, who has introduced evidence of reports injurious to the plaintiff's character, cannot object to the admission of proof of good character, or of the falsehood of such reports. — *lb.*

Trust. If a party voluntarily receives money or any personal property which by contract he is not to receive till a subsequent day, the law will regard him as trustee for the payer, and apply the payment when due. And an averment of payment on the subsequent day, will be sustained by proof of such reception on the previous day. — *Pierce v. Smith*, 208.

Where A. contracted with B. to deliver him certain articles on the 26th of September, and on the 10th of May previous delivered a part of them, which were accepted by B. — *Held*, that proof of the delivery and acceptance in May, would sustain the averment of delivery in September. — *lb.*

Variance. If immaterial matter alleged in a declaration is proved, the proof of other immaterial matter, not so alleged, will not make a variance, even though it qualifies what is alleged. — *Webster v. Hodgkins*, 128.

In case for deceit by means of a false warranty, if the price of the article sold is stated as if paid in ready money, it will be no variance, if it be proved that the price is payable at a future day or in specific articles. — *lb.*

Verdict, Setting Aside. A verdict will not be set aside for the reason that incompetent testimony has been admitted on one side, to meet or rebut proof of a similar character, upon the same point, introduced on the other side. — *Furbush v. Goodwin*, 425.

Warranty. If a warranty is made at any time before the contract of sale is completed, it will be valid. — *Webster v. Hodgkins*, 128.

Waste. A tenant for life, without impeachment of waste, can do no act to affect the inheritance in an unreasonable or unconscious manner. — *Clement v. Wheeler*, 361.

In general, such a tenant may cut down timber and convert it to his own use. — *lb.*

But he cannot commit malicious, or, as it is called, equitable waste, so as to destroy the estate. — *lb.*

He cannot cut trees, planted or left standing, for the ornament or shelter of a mansion-house or grounds. — *lb.*

The remedy, by injunction, is applicable to every species of waste; it being to prevent a known and certain injury. — *Ib.*

The assignee of a tenant for life, without impeachment of waste, may, in a proper case, be restrained by injunction from committing waste. — *Ib.*

Will. A testator bequeathed to his wife one half of his personal estate and the use of one-third part of his real estate; and the residue of his property he gave to his grandchildren, and made the defendant his executor. His wife conveyed to the defendant all her distributive share in the property, and all her interest in the estate, which was administered in the insolvent course, and the defendant received the rents and profits of the land — *Held*, that the rents could not be regarded as part of the personal estate bequeathed to the wife by the will. — *Sparhawk v. Allen*, 261.

A testator by his will provided that his wife should be supported by the defendant, and that if she chose to reside with one of her daughters, he should support her there; the daughters at the time were residing in country towns, but one of them afterwards removed to a city, where the expenses of living were much higher, and the plaintiff went to reside with her — *Held*, that the intention of the testator was that his widow should be supported at an expense equal to what it would be in the towns where the daughters then resided, and that the defendant was not liable to support her in a city where the cost of living was much higher. — *Bartlett v. Bartlett*, 278.

Miscellaneous Intelligence.

DEFENCES TO NEGOTIABLE PROMISSORY NOTES TRANSFERRED AS SECURITY FOR PRE-EXISTING DEBTS.¹ — Is a negotiable promissory note, or bill of exchange, taken and held by the indorsee, merely as collateral security for a pre-existing debt, due from the indorser, open to the equities existing between the original parties? It is held that such defences are admissible, or that such indorsee is not a holder for valuable consideration, in the following American cases: — *Bramhall v. Beckett*, 31 Maine, 207, in 1850; *Williams v. Little*, 11 N. H. 66; *Jenness v. Bean*, 10 lb. 266; *Sergeant v. Sergeant*, 18 Verm. 377, in 1846, (overruled by *Atkinson v. Brooks*, in 1854); *Brush v. Scribner*, 11 Conn. 388; *Coddington v. Bay*, 20 Johns. 637; *Stalker v. McDonald*, 6 Hill. 93, in 1843; *Petrie v. Clark*, 11 Serg. & Rawle, 377; *Breckenridge v. Moore*, 3 B. Monroe, 629; *Russell v. Haddock*, 3 Gilman, 233; *Bank of Mobile et al. v. Hall*, 6 Alabama, 639; *Bostwick v. Dodge*, 1 Doug. 413; *Bush v. Peckard*, 3 Harr. 385; *Bond v. Central Bank of Georgia*, 2 Kelly, 93; *Smith v. Babcock*, 2 Woodb. & Minot, 288. In view of the strong concurrence of the adjudged cases on this point, the editors of the American Leading Cases say in notes to *Swift v. Tyson*, 16 Peters: "The principle may now be considered as settled, that if the instrument is given merely as collateral security for an existing debt, the right of action on the original debt not being altered, it is not given for a valuable consideration, and is not discharged of equities." — Vol. I. p. 344.

Strangely enough, the gratuitous remarks of the learned judge, who delivered the opinion of the United States Supreme Court, in *Swift v. Tyson*, have been cited as authority for the contrary doctrine. But it would seem to be enough to say that the case called for no such decision,

¹ The following communication relates to a subject discussed in a case reported in this number. *Atkinson v. Brooks*, ante. — Ed.

and the observations thus made, are no more to be deemed the opinion of that court, than are the observations of Mr. Justice Catron, who delivered a protest at the time the decision was announced, and said: "I never heard this question spoken of as belonging to the case," &c. Upon this point no American case is cited in that opinion. The following *English* cases are referred to, however, as supporting the opinion of Judge Story. *Bosanquet v. Dudman*, 1 Stark. 1; *Ex parte Bloxham*, 8 Ves. 531; *Heywood v. Watson*, 4 Bing. 496; *Bramah v. Roberts*, 1 Bing. N. C. 469; *Percival v. Frampton*, 2 Cr. Mees. & Rosc. 180. After a careful and candid review of these cases, in giving his opinion in *Stalker v. McDonald*, Chancellor Walworth concludes by declaring that there is no decision in any court of England directly upon the question. And this declaration is certainly not shaken in the least by the most careful reading of the cases cited. The *obiter dictum* of Baron Parke, in *Frampton v. Percival*, is the most that can be gleaned from the cases. The case of *Stalker v. McDonald*, is professedly a reconsideration of the whole subject, and a reaffirming upon most learned and elaborate reasoning of the judgment in *Coddington v. Bay*, and of the thousand judgments that have followed its authority since 1822. So, also, is the lucid and excellent opinion of Mr. Justice Howard, in the still more recent case of *Bramhall v. Becket*, 31 Maine, 207. In this case the decisions in Massachusetts are quoted as approving the same doctrines as *Coddington v. Bay*; and the cases named are *Chicopee Bank v. Chapin*, 8 Met. 40; *Thompson v. Shepherd*, 12 Met. 311; *Washington Bank v. Lewis*, 22 Pick, 32. But the first of these cases (*Chicopee Bank v. Chapin*) was one where the bank loaned money directly on the credit of the note in suit; the second (*Thompson v. Shepherd*) was where the note was taken by the indorsee from a second indorsee, not as security, but as payment; the third case (*Washington Bank v. Lewis*), was where the note in suit was pledged, not only as security for money advanced, but also for a prior existing debt. It was argued that the recovery could only be for the money advanced. The court held that "if the note had been taken solely for the purpose of securing a prior existing debt, the cases would apply." "But as the plaintiffs advanced a large sum of money partly for the purpose of securing a prior debt, they are entitled to recover the whole amount of the note." Hence, it is perhaps necessary to admit that these cases do not directly support the inference as stated in *Bramhall v. Becket*, but certain it is they do not go contrary to it, although they are frequently cited as bearing in that direction. *Blanchard v. Stevens*, 3 Cush. 166, is also sometimes relied upon as holding a security for a precedent debt, as for value, when the only question in the case was whether taking in payment was for value, and all that is said upon the other question is out of the case. In the opinion by Dewey, J., Chancellor Kent, (3 Com. 80,) is cited as saying: "Mr. Justice Story, in his treatise on promissory notes, p. 215, repeats and sustains the decision in *Swift v. Tyson*, and I am inclined to concur in that decision as the plainer and better doctrine." And this is regarded as a surrender by Chancellor Kent of his doctrine as confirmed in *Stalker v. McDonald*. But it is to be remembered that the decision in *Swift v. Tyson* may well be recognized, and yet this ground by no means surrendered. The Supreme Court of Maine is also claimed by Mr. Justice Dewey as sanctioning the opinion of Mr. Justice Story, but the decision of the latter court in *Bramhall v. Becket*, announced one year after that of *Blanchard v. Stevens*, leaves no doubt of the opinions of the court in Maine. *Stoddard v. Kimball*, 6 Cush. 470, proceeded certainly upon the ground that a note taken as collateral was taken for value, although the only question discussed in the opinion is, whether the whole

note in suit, or only the amount due on the principal debt should be recovered; and the principal debt only was recovered. For aught that appears, there may have been *forbearance*, or other *new* consideration in fact, and the point *therefore* waived in the trial. The case can hardly be regarded as authority upon a question not raised. In the case of *Smith v. Babcock*, 2 W. & M. decided in the Circuit Court of the United States, at Boston, October Term, A. D. 1846, Woodbury, J., reasons thus: "Was there any residuary interest left in the vendor? Any equity of redemption? Any right to have a return of them on the payment of money or performance of some act? If so, it was not within the principle of protection to negotiable paper in the market, as that principle is to protect a purchaser and not a mortgagee who takes the notes as security only for other matters, instead of buying them in market overt as negotiable paper. He thus holds them merely as he would unnegotiable paper or personal property pledged for a like purpose. In such an event, he does not hold them for an agreed price paid outright for the notes or credited for them on a former debt at the time of receiving them instead of when collected. The destruction, or loss, or failure in any way of this lost property would fall on the assignor, while of the former it would fall on the assignee or buyer. These seem the natural and truest tests of such transactions, rather than the fact of the consideration being new or pre-existing." *Precisely* the same reasoning is adopted by the Supreme Court of Vermont. Redfield, C. J., in *Poor v. Woodburn et al.*, 25 Verm. 239. This was replevin for certain goods, purchased of plaintiff by one Eli S. Farr, by means of alleged false representations, and delivered to him on a credit. The defendant, Rufus Farr, claimed to hold the goods, or part of them, in pledge from Eli S. Farr, to secure certain pre-existing debts, and taken without notice of the fraud. The defendant, Woodburn, had attached part of the goods on other debts of Rufus Farr against said Eli S., and on suits in favor of other creditors. The county court charged the jury that if the fraud was made out, the plaintiff might reclaim the goods from the possession of Rufus Farr, if only pledged to him for liabilities incurred for said Eli before said sale by the plaintiff, and from the attachments on debts existing before said sale. The opinion of the Supreme Court is given by Chief Justice Redfield on this point as follows: "We might say here, perhaps, that it seems to be conceded in the argument, or very nearly so, and it is certainly so treated in some of the cases referred to, that a creditor who attaches property obtained by fraudulent practice or misrepresentation, does not acquire any better right to hold it as against the former owner who has been thus fraudulently deprived of it, than the fraudulent vendee had. And if so, it seems to follow that a mere assignment of the goods in security for a pre-existing debt, could confer no greater right than an attachment; as there is no *new consideration* for the *assignment*, the assignee only takes the right of the assignor." The instructions to the jury were approved. Yet the same court held precisely the contrary doctrine as to a promissory note, thus fraudulently obtained, and lodged for collateral security, in a recent case, *Atkinson v. Brooks*, decided in November, 1854, and not yet reported. *Ante*. What, then, is the *mercantile law* of this country upon this subject? "*Delirant leges, plectuntur Achiivi*."

S. B. C.

LIFE INSURANCE. — A very interesting case of Life Insurance was tried last week in one of the Cincinnati Courts. A gentleman, as we gather from the *Gazette*, being on the point of leaving that city for St. Louis, made arrangements for taking out a policy on his life for the benefit of his wife, in the sum of \$2,500. Having been duly examined by the physician of the Company, he left for St. Louis. For some cause, the health certi-

ificate obtained by the applicant did not prove satisfactory to the Company ; another examination, therefore, took place in St. Louis, the result of which having been transmitted to the Company, the officers notified the agent of the applicant that they would take the risk, and handed him a form of application to be signed by the wife, the plaintiff. The signature of the plaintiff was obtained on the 18th of September, and the application returned to the office on the same day. Thereupon the policy was duly made out for the plaintiff, dated September 20, and taken to the agent, who, however, before the delivery of the policy, was requested to sign a guarantee dated September 20, of the purport that the plaintiff's husband was then in as good health as he was at the time of the examination at St. Louis, which guarantee was signed by the agent without the knowledge or consent of the plaintiff. On the 17th of September, the husband was taken sick at St. Louis, and was under treatment until the 21st, when he died.

The Court having charged the jury "that the guarantee did not bind Mrs. Strang, unless made by her agent ; also, that the representation in Mrs. Strang's application, *that Colonel Strang is now in good health*, was a warranty, but that it was a question for the jury, whether the parties in making and receiving that warranty, did not refer to the time when they had the latest intelligence from St. Louis," a verdict for the plaintiff was found for \$2,925. — *New York Times*.

AN OLD FASHIONED LAWYER. — Mr. May was himself a lawyer of the old school ; that is, he brought the full powers of a strong and clear mind to the investigation of those principles, which lie at the foundation of civil society, and whose practical application to the daily business of men makes law eminently one of the liberal professions. This great and valuable science, calculated in its purity to elucidate and maintain the higher principles and purposes of life, had scarcely begun to show symptoms of what many persons consider modern degeneracy in its practice. An eminent lawyer of those times would be, of course, not only a person of competent learning in his profession, at least, but also a man of honor, and elevated notions ; and the necessities of his position, if not his own inclination, often made him really a statesman, of the old generous stamp. No doubt, pettifoggers then existed, and in that day, as in our own, often had eminent success. Mere mercenary characters of this description have always flourished, and helped to degrade all professions. Medicine has had its quacks ; there have been hirelings amongst the clergy, and sharpers in trade. These, we will hope, are the excrescences of human nature. Although the profession of law certainly affords frequent opportunities to one so disposed, — and so of all other occupations, — to be a villain ; on the other hand, it offers far higher inducements to him to be an honest man. At the time of which we write, a reputation of the latter character was certainly necessary, in order to secure signal success in this pursuit. — *Eastford, by Wesley Brooke*.

LORD ROBERTSON. — Another death — another light of the times struck out ! Lord Robertson, a judge of the Court of Sessions, Scotland, died suddenly of apoplexy, at Edinburgh, on Wednesday, the 10th instant. Patrick Robertson was of full habit of body, and this fate might have been apprehended. As a humorist, in friendly and social circles, he was unequalled ; and yet an excellent lawyer, and a good and grave judge. He has not long survived his intimate companions, Wilson and Lockhart, "who many a time and oft" enjoyed the exuberance of his fun and drolery. As an example, I may mention that he would sing an Italian cavatina, without a word of Italian in it, but the *idem sonans* of syllables and cadences so like, that no-one but those in the secret could suspect the ruse.

The same spirit dictated a Gaelic sermon, without a Celtic word; but, in short, his imitations were numerous and quite inimitable. And his purer nature was not less observable. I have several volumes of his vacation tours and poems, printed for private circulation, and which do honor to his heart and genius. A selection from these was published. I have not time for a more detailed notice, but may send some additions by-and-bye. Now, indeed, I can only draw a heavy sigh, and exclaim, "Alas, poor Yorick!" — *Corr. Boston Traveller.*

COSTS. — *John Phelps v. H. Hastings.* — This notorious "sheep case," as it is called, upon which there have already been three trials, and bills of costs made, amounting probably to not less than three thousand dollars, has again been got back into court, for the reason that one of the jurors disclosed the verdict before the deliverance thereof in court, and also, that the officer having charge of the said jury advised and interfered with their deliberations and took a very active part in the same. The verdict, last June term, was \$30 and costs for plaintiff, — about one cent of verdict to one hundred cents of costs. — *Vermont paper.*

SALVAGE, EXTRAORDINARY PRIZE. — Mr. George Mansfield, son of the late Mr. Mansfield, ship-builder, of Lyme Regis, has had £5,000 awarded to him as salvage for recovering 60,000 sovereigns from the ship *Sacramento*, wrecked at Port Philip on the 28th of April last. His boat's crew, six in number, were also awarded, one £2,000, and the others £1,500 each, making a total of £14,500. — *Evening Mail (London).*

Notices of New Books.

A COMPEND OF LECTURES ON THE AIMS AND DUTIES OF THE PROFESSION OF THE LAW; delivered before the Law Class of the University of Pennsylvania. By GEORGE SHARSWOOD, Professor of the Institutes of Law. Philadelphia: T. & J. W. Johnson. 1854.

We have read this volume with interest, and commend it to our readers, whether their "aims and duties" lie within the Bar or beyond its precincts, especially to the young member of the profession, just entering upon its untried and sometimes dangerous paths, but also to those, if such there be, who fancy lawyers must be the pettifoggers of popular farces, with conscientiousness in an inverse ratio to their success; to those who think the advocate must lie one half of the time, on a simple calculation of chances.

As the title indicates, Mr. Sharswood is a Professor of the Institutes of Law in the University of Pennsylvania, and the work is a compend of lectures to the young men under his instruction, upon a subject of the greatest importance to them and to the public — whose interests are, perhaps, more affected by the character of the legal profession, than they are apt to believe. We mean the Ethics of Professional Conduct; the lawyer's duty to the client who entrusts his dearest interests to his care; to the Court, whose minister in the performance of justice he is; to society and to himself, to his own sense of honor and right. Professor Sharswood writes in an agreeable and effective manner, and we should be glad to see his work in the hands of every student at law, indeed, of every lawyer.

The condition of the legal profession is no bad thermometer of the society which sustains it. The workman is worthy of his hire. If men are prone to work injustice through the forms of law, they will seek for suit-

able instruments, and find them, we fear, even in the temple of Justice; but if they come with honorable purposes and pure aims, her true priests are ready to do their bidding. Nor is the Bar a mere indicator of the state of society. It has an influence on society too obvious and too mighty to be unheeded, and it is every man's interest that it should be true to its calling.

"The artizan is fond of believing that he is the foundation of society. The soldier, that he is his country's defence. The merchant, that he is the link between nations, and the diffuser of civilization. The clergyman, that he is the servant of the Almighty. And the lawyer must believe that he is something better than the minister of human litigiousness, in order to maintain his self-respect, and to raise his heart above the crawling and grovelling passions, which have too often been the origin of his briefs. In vain he would, as a substitute for that faith, survey his accumulated wealth, and exclaim with the sordid Roman Emperor, '*Non olet.*' The higher part of his nature tells him that these golden heaps are untainted only when they are not the sole object of exertions, but are purified and consecrated by nobler aims. We know nothing more venerable than those lawyers in whom these feelings were a ruling and a guiding principle. The Hales, the Mansfields, the Denmans, the Romillys, the Langdales, the Talfourds, in England; and the Molés, the Domats, and the D'Aguesseau, in France; — men whose majestic advocacy guilt shrank from seeking, while virtue seemed to command it, by an irresistible attraction."

It is well, then, that the ardent ambition which stimulates the young aspirant to professional distinction, should be purified and elevated by a just appreciation of his duties and responsibilities; and, not the Bar alone, but all of us should feel grateful to one who exerts himself as Judge Shaw-wood has done, to place before those who are about to enter upon its struggles and duties, a nobler aim, and a more honorable prize than the applause of the unthinking world, or "golden heaps" of wealth. We thank him for his counsel, and wish it the influence it deserves.

REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPREME COURT OF THE STATE OF WISCONSIN, AT THE JUNE TERM, A. D. 1853. By ABRAHAM D. SMITH. Vol. I. Milwaukee: Published by Rufus King & Co. 1854.

The profession are indebted for this volume to one of the Justices of the Court whose decisions are reported. With due allowance for the unfavorable circumstances under which it was prepared, it is as creditable to the reporter as the decisions are to the learning and ability of the Court. Its examination may tend in some degree to correct our eastern idea, as to the rush and hurry of western life, for the cases generally appear to involve but a small amount of property, and we should think would hardly pay even the successful parties for the care and expense of litigation. In fact, throughout the United States where property is so easily acquired by well directed industry, it is strange to notice the prevalence of litigation for trifling sums, and we presume that the tendency to resort to law and lawyers must result quite as much from excitement of feeling as from any considerations of pecuniary interest on the part of the suitors.

It is also striking to observe that while in many of the older, richer and more commercial States of the Union, the old technicalities of pleading are fast vanishing under the influence of a looser, and, as is claimed, a more liberal and practical course of legal procedure, the subtle learning of this science is so tenaciously retained in many of the new States, and employed in the settlement of questions of trifling amount. A glance at most of the cases in this volume will illustrate the truth of this reflection. There is

nothing in the Reports of New York or Massachusetts which brings us back so closely to the learning of the Year-Books, and Saunders and Chitty. So far as the precision and certainty of legal science is concerned, we are not sure that we have chosen the better part. The volume before us is full of learning, and we think the decisions generally, are worthy of the respect of the profession. The book is well printed, with a large and readable type, though there are some inaccuracies which more care on the part of the compositor and proof-reader would have remedied. We notice too some errors in the use of Latin terms and sentences, which we presume are to be attributed to the same cause.

We shall receive with pleasure the second volume, which Mr. Justice Smith promises us, is soon to appear.

THE LAW OF FIRE AND LIFE INSURANCE. By CHARLES ELLIS, Esq., of Lincoln's Inn, &c. Second American, from the last English Edition, with Notes, Additions, and References, to American and late English Decisions. By WILLIAM G. SHAW. Burlington: Chauncy Goodrich. 1854. pp. 326.

This is a new American edition of a valuable English work, upon a very important department of Law, and one which is daily becoming more so. It is, comparatively, a short time since insurance against fire gave employment to any considerable amount of capital, or afforded subjects for much litigation, and still more recently, that life insurance commanded much attention on this side of the Atlantic. And now, few subjects employ more capital, or afford more scope for forensic discussion, or judicial investigation than these two. The work of Mr. Ellis has been regarded as very thorough and accurate, so far as the English decisions are concerned. And the notes of Mr. Shaw, in regard to the American decisions, are very extensive, covering about seventy pages in small type, beautifully executed, and leaded, so as to be easily read, and from the examination we have been able to give them, seem to embrace every case found in our reports upon these subjects. This edition of Ellis, on Fire and Life Insurance, seems to us, an exceedingly useful book, as well for the student as the practitioner at the bar, and its very moderate price will be no small recommendation in these tight times. Mr. Goodrich is certainly entitled to the credit of selecting a very good book, and publishing it in good taste, and in a substantial manner. But the editor and publisher seem to have left nothing to desire, in the thoroughness and faithfulness of their work.

A PRACTICAL TREATISE ON BILLS OF EXCHANGE, CHECKS ON BANKERS, PROMISSORY NOTES, BANKERS' CASH NOTES AND BANK NOTES, with References to the Law of Scotland, France, and America. By JOSEPH CHITTY and JOHN WALKER HULME, Esqrs., of the Middle Temple, Barristers at Law. Twelfth American from the ninth London Edition, newly modelled and greatly enlarged and improved. BY J. C. PERKINS. Springfield: Published by G. & C. Merriam. 1854.

The usefulness of Mr. Chitty's books as aids in daily practice is too well known to require any extended remarks upon this new edition of one of them. And the valuable notes of the American Editor, who adds long-continued experience as a commentator, to the, perhaps, greater advantage of the daily application of the cases and principles discussed in his pages, in judicial inquiry, are a most important addition.

In our opinion, the book is, in the language of the preface, "the most full and complete treatise extant on the subject of Bills and Notes," and of great use and value to an American lawyer.

Obituary Notice.

Died, at Peterboro', N. H., December 31, JAMES WALKER, aged 70. Mr. Walker was one of the oldest members of the bar in Hillsborough County, having been in active practice more than forty years. Since 1848, he had ceased to attend the courts, and retired from professional business. He was born at Rindge, N. H., March 10, 1784, and educated at Dartmouth College, where he was entered in 1800, and graduated in 1804. He studied Law with Governor Samuel Bell of Francestown, and was admitted to the bar in 1808. He first opened an office at New Boston, in the same county; but, after a few months, returned to Francestown, where he was, for several years, associated as a law partner with Governor Bell, and upon the retirement of the latter from the bar, took his office and business. He continued in Francestown till 1816, when he removed to Peterboro', where he continued to reside, with the exception of a few years' interval, till the time of his death. He was succeeded in his business at Francestown by the late Judge Levi Woodbury, who had been a student in his office. He was twice married; first to Sally Smith of Cavendish, Vt., a niece of the late Judge Smith of Exeter, and after her decease to Mary Ann T. Abbot of Windham, N. H., who survives him. As a lawyer, Mr. Walker was very much respected both for the accuracy of his learning, and the soundness of his judgment. He seldom advocated causes, but for many years he had a considerable court practice, both in Hillsborough and Cheshire counties. In politics, he was in early life a Federalist, and afterwards a Whig; and several times represented his townsmen in the Legislature. He was remarkable for accuracy and method in business, and for candor and uprightness in all his professional and private dealings. His judgment and opinions were much relied on by his towns-people, and his loss very generally felt and lamented.

Insolvents in Massachusetts.

Name of Insolvent.	Residence.	Commencement of Proceedings	Name of Commissioner.
Adams, Samuel P. *	Cambridge,	Jan. 19, 1855,	John P. Putnam.
Alden, Charles	Dorchester,	" 13,	Samuel B. Noyes.
Atwood, Albert †	South Hadley,	" 25,	Haynes H. Chilson.
Atwood, Albert A. †	South Hadley,	" 25,	Haynes H. Chilson.
Bartlett, Levi	Enfield,	Feb. 5,	S. T. Spaulding.
Bass, Stephen G.	Brookline,	Jan. 12,	Francis Hilliard.
Beal, Samuel H.	Boston,	" 9,	John P. Putnam.
Bennett, Stephen	Boston,	" 4,	John P. Putnam.
Binney, Charles J. F.	Roxbury,	" 11,	Samuel B. Noyes.
Breed, Aaron E.	Danvers,	" 4,	John G. King.
Britten, Simeon A.	Roxbury,	" 27,	Samuel B. Noyes.
Brooking, Thomas	Salem,	" 29,	John G. King.
Brown, Augustus	Boston,	" 12,	John P. Putnam.
Bruce, Dexter	Winchendon,	" 31,	C. H. B. Snow.
Busley, Samuel C.	Worcester,	" 15,	T. G. Kent.
Burrell, Adoniram	Randolph,	" 22,	Samuel B. Noyes.
Campbell, John M.	New Bedford,	" 11,	Joshua C. Stone.
Chamberlain, Wm. H.	Dorchester,	" 13,	Samuel B. Noyes.
Chandler, Newton A.	Medford,	" 15,	Asa F. Lawrence.
Chase, Lucius C.	Boston,	" 19,	John P. Putnam.
Childs, Henry	Adams,	" 26,	Shepard Thayer.
Clarke, John S.	Lynn,	" 31,	John G. King.

* For Notes to the above references, see next page.

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Commissioner.
Clark, Elam W.	Oakham,	Jan. 12, 1855,	Charles Brimblecom.
Corthell, John	Boston,	" 26,	John P. Putnam.
Cowen, Bernard	Roxbury,	" 11,	Francis Hilliard.
Cowles, James M.	Belchertown,	Feb. 2,	I. F. Conkey.
Crocker, Wm. H.*	Cambridge,	Jan. 19,	John P. Putnam.
Cummings, Edmund	Lowell,	" 29,	Isaac S. Morse.
Cundall, J. W.	Springfield,	" 9,	Edward B. Gillett.
Cundall, J. W. †	Springfield,	" 9,	Edward B. Gillett.
Deering, Samuel	Brighton,	" 24,	Asa F. Lawrence.
Fish, Aloniram J.	East Bridgewater,	" 6,	Welcome Young.
Flagg, George	Lynn,	" 8,	John G. King.
Gates, Noah F.	Lowell,	" 26,	Isaac S. Morse.
Griswold, Newton	Buckland,	" 1,	David Aiken.
Haley, Tobias A. §	Boston,	" 10,	John M. Williams.
Heath, Job W.	New Bedford,	Dec. 28, 1854,	Joshua C. Stone.
Hill, George R.	Lawrence,	Jan. 26, 1855,	John G. King.
Holt, Alexander B.	Enfield,	" 20,	S. T. Spaulding.
Johnson, Abijah S.	Newton,	" 19,	Isaac S. Morse.
Johnson, Napoleon B.	Millford,	" 9,	Alexander H. Bullock.
Johnston, John S.	Gloucester,	" 4,	John G. King.
Jones, Roscius W.	Leominster,	" 12,	C. H. B. Snow.
Latham, Emer W.	Northboro,	" 20,	Alexander H. Bullock.
Leach, Wm. H.	Boston,	" 10,	John P. Putnam.
Lombard, Roswell ‡	Springfield,	" 9,	Edward B. Gillett.
Longley, Benjamin A.	Boston,	" 5,	Charles Demond.
Longley, Isaac A.	Boston,	" 5,	Charles Demond.
Loud, Reuben	Abington,	" 4,	Welcome Young.
Lucas, Milo	Newton,	" 12,	Asa F. Lawrence.
Mallory, George	Adams,	" 26,	Shepherd Thayer.
Mason, Andrew A.	South Reading,	" 26,	Asa F. Lawrence.
Melvin, Wm. B. §	Boston,	" 10,	John M. Williams.
Merchant, Wm. D. ¶	Gloucester,	" 26,	John G. King.
Metropolitan Fire and Ma- rine Insurance Co. }	Boston,	" 12,	John P. Putnam.
Mitchell, Edward	Bridgewater,	" 4,	Welcome Young.
Moore, Frank	Dorchester,	" 16,	Francis Hilliard.
Moore, Robert R.	Northfield,	" 27,	David Aiken.
Morton, Wm. W.	Lynn,	" 6,	John G. King.
Nash, Alden W.	Weymouth,	" 8,	John P. Putnam.
Newhall, Elbridge G.	G. Danvers,	" 13,	John G. King.
Packard, Silvanus	North Bridgewater,	" 8,	Welcome Young.
Pepper, Thomas S.	Boston,	" 8,	Charles Demond.
Pierce, Jabez N.	New Bedford,	" 11,	Joshua C. Stone.
Pike, Luther W.	Upton,	" 27,	T. G. Kent.
Pomeroy, Thomas J.	Easthampton,	" 23,	H. H. Chilson.
Potter, Rufus B.	Grafton,	" 6,	A. H. Bullock.
Ransom, Greeley	Boston,	" 27,	John P. Putnam.
Richardson, Horace	Medway,	" 19,	Francis Hilliard.
Richardson, Thomas B.	Dorchester,	" 22,	Samuel B. Noyes.
Richmond, Arba	Amherst,	" 6,	I. F. Conkey.
Sargent, Benjamin I.	Lynn,	" 31,	John G. King.
Sargent, Wm. B.	Stoughton,	" 23,	Samuel B. Noyes.
Sibley, Freeman F.	Sutton,	" 10,	T. G. Kent.
Skilton, Samuel D.	Charlestown,	" 4,	Isaac S. Morse.
Skinner, Benjamin H. *	Cambridge,	" 19,	John P. Putnam.
Southgate, Samuel	Taunton,	" 19,	Joshua C. Stone.
Stevens, Samson	Lowell,	" 5,	Isaac S. Morse.
Stone, Moses P.	Boston,	" 5,	Charles Demond.
Taylor, Daniel A.	Medford,	" 6,	Charles Demond.
Taylor, James	Boston,	" 13,	John P. Putnam.
Upton, George W.	Lowell,	" 29,	Isaac S. Morse.
Veazie, George H.	Dorchester,	" 20,	Samuel B. Noyes.
Wellcome, Jacob H.	Dedham,	" 19,	Samuel B. Noyes.
Wells, A. D. ¶	Gloucester,	" 26,	John G. King.
Wentworth, Horace	Bridgewater,	" 3,	Welcome Young.
Wiggin, Andrew	Dedham,	" 5,	Francis Hilliard.
Wilmarth, Seth	Boston,	" 31,	John M. Williams.

* Crocker, Adams & Co.

† Lombard & Cundall.

|| B. A. & I. A. Longley.

† Albert A. Atwood & Co

§ Haley & Melvin

¶ Partners. Firm not stated.

THE
MONTHLY LAW REPORTER.

APRIL, 1855.

THE WARD TRIAL

THE February number of the Law Reporter contained, without editorial comment, a review of the article upon this trial, which appeared in the July number of the present volume, p. 121. Some reply to the positions taken in that article, some deprecation of the censure which not this community alone, but public opinion, has uttered against the participants in that disastrous acquittal of the prisoner, was expected by the writer. It was not supposed that either his notice of the trial, or his comments upon the management of the defence, would receive the unanimous approbation of the Kentucky bar.

"In law, what plea so tainted and corrupt,
But being seasoned with a gracious voice,
Obscures the show of evil. In religion,
What damned error but some sober brow
Will bless it and approve it with a text."

The temper of the review betrays the weakness of a bad cause, and although neither the dignity of its tone, nor the courtesy of its style, nor the force of its argument, entitles it to a reply, yet as it probably contains the best defence which can be urged in favor of the counsel through whose successful exertions the law was perverted, the profession

injured, and justice defeated and trampled under foot, we shall answer at length the positions of the reviewer. The iniquity of the trial will thus be rendered still more apparent, from the feebleness of the only justification of any part of the proceedings which has yet appeared.

In the brief history of the case which formed the introduction to the notice of the trial, we said that when the verdict was announced, it "created in Louisville the most intense indignation." As evidence of the correctness of this assertion, we stated several facts: 1st. The jury, the prisoner, the "swift witness" for the defence, and even some of the counsel, were burnt in effigy. 2d. Mr. Ward's house, prudently vacated, was attacked by a mob, and injured by fire." Both of these statements are not only not denied, but admitted by the reviewer to be true. 3d. A public meeting was held in which the trial and the parties concerned in it, "were severely denounced, and resolutions sympathizing with Mr Butler's family were passed." To render this proof of public indignation the more striking, we described the meeting as "remarkable, not only for its extraordinary numbers, being the largest ever held in Louisville, but equally so for the character of the persons who composed it, and directed the proceedings. It was not a tumultuous mob, nor assembled by persons ever ready to take advantage of any occasion of public excitement. It was mainly constituted of, and altogether directed by intelligent, educated, and influential citizens, who appeared to feel with solemn conviction, that the verdict had done foul wrong to the name and honor of Kentucky, and had converted the proceedings of justice into a contemptible farce."

This account of the character of the meeting is pronounced by the reviewer to be "*a vile slander upon the intelligent, educated, and influential citizens of Louisville.*" It is elsewhere, in connection with other statements, denounced in the following language:—"A more unfair presentation of this case, or a *grosser perversion of all truth has seldom been embodied in the same number of words.*"

To satisfy the demands of *truth and justice*, the reviewer proceeds to give what he professes to be, an "*authentic history of this peaceable, quiet and orderly meeting.*"

Accordingly he produces a copy of an incendiary hand-bill, headed, "To the Wolfe Bloodhounds of Louisville,"

alluding to a rhetorical flourish used by Mr. Wolfe in his argument on the trial, stigmatizing the citizens of that place as pursuing the prisoner with "bloodhound avidity;" he describes at great length the outrages committed upon the property of Mr. Ward senior, and the other proceedings of an infuriated and reckless mob, "estimated at between two and three thousand, assembled around his mansion."

It is to this rabble, thus collected, and thus conducting, that the reviewer assumes our description was intended to apply.

From the evidence furnished by the report of Ward's trial, it appears allowable in Kentucky to misstate the positions, and to garble the evidence of an opponent. The reviewer has improved upon the practice, and invented the slander which he triumphantly refutes.

No one can read the original article and fail to perceive that the transactions of that terrible mob were cited only as one set of circumstances, showing the indignation excited in the popular mind by the verdict for the prisoner. When we said that "by a not unnatural process of mind, this deeply seated and irrepressible indignation turned itself against the prisoner's counsel, and especially against the distinguished gentleman who volunteered his services," no one but the reviewer could fail to perceive that we alluded to the general indignation which was felt, not in Louisville alone, nor in Kentucky alone, but throughout the United States. The existence of this feeling it is idle to deny. For two months after the verdict was rendered, scarcely a newspaper from any part of the country failed to contain an exhibition of it.

The meeting to which we alluded, and of the proceedings and character of which the reviewer is not ignorant, was assembled by a summons very different from the one he has produced. To demonstrate the accuracy of our description; to show the true nature of the meeting; to exhibit the solemn conviction which appeared to pervade it; to efface the new stain which one of her own sons has thrown upon the fame of Louisville, already deeply sullied by an appalling assassination and the outrages of a furious mob; we append the full account of it, as contained in the Cole report.

"The news of this verdict was received in the city of Louisville, as it has since been throughout the State of Kentucky, and over the entire Union, with the greatest

indignation. In Louisville, especially, where it was published on the morning of Friday, April 28th, the excitement immediately produced was intense. But little business was done on that day or the next. All men seemed to think that an indelible stain had been fixed upon the fair fame of the State, by the mockery of a trial that had been had, and the iniquitous verdict that had been rendered; and the oldest, most substantial, and most respected citizens, demanded a public meeting, that the city of Louisville might cleanse itself of the disgrace that would otherwise rest upon it. In the newspapers of Saturday morning appeared the following:

‘NOTICE.—A meeting of the citizens of Louisville favorable to the erection of a monument to the memory of the late lamented PROFESSOR BUTLER, is requested at the Court House, on Saturday evening, April 29th, at early gas light.’

Pursuant to this call, the largest and most respectable assemblage that has ever convened in the city, gathered within and around the Court House at an early hour in the evening. The number present has been variously estimated at from eight to twelve thousand. The west room in the second story of the building, was filled at a very early hour. Several old, universally known, and generally esteemed citizens had been requested to act as officers, but the press was so great that the principal of them could not effect an entrance to join those who were earlier in their attendance. Some delay in effecting the organization was thus induced, and, during its continuance, Sherrod Williams, on request, addressed the meeting. Mr. Williams fully recognized the justice of indignant feeling that had moved, as it were, a whole community, and expressed his own deep sympathy with it, but deprecated violence to person or property, and besought people to content themselves with a warm and decided expression of their sentiments with reference to the crime which had been committed, and the mockery of a trial that had been had of its guilty perpetrator. Mr. Williams was listened to with the most respectful attention; but the crowd outside, which was continually augmented by fresh arrivals, became impatient to know what was going on within. It was, therefore, agreed to go below; but when most of those who were up stairs had got down, anything like a satisfactory organization there was found to be impossible. It was, therefore, proclaimed

that the regular meeting would organize above, and the after resolutions should be reported and passed, they would be sent down for ratification. On returning to the large room above, Gen. Thomas Strange was chosen President, and Mr. George Anderson Secretary. Gen. Strange made a brief but appropriate and forcible address on taking the chair, at the close of which, on motion, John H. Harney, Theodore Bell, Bland Ballard, W. D. Gallagher, W. T. Hagg, Edgar Meedham, and A. G. Munn were appointed a committee to draft resolutions. While this committee was absent, Rev. J. H. Heywood was requested to address the meeting, which he did with his accustomed beauty and effectiveness. Before the return of the committee Bland Ballard read the subjoined resolutions which were received with the most decided approbation, and carried by a unanimous vote of the assemblage.

'The citizens of Louisville assembled in public meeting for the purpose of giving expression to their opinions respecting the trial and the verdict of the jury in the case of the *Commonwealth v. Matt. F. Ward*, recently tried at the Hardin County Court, do submit to the public at large, but more especially to the citizens of the Commonwealth of Kentucky, the following resolutions, as expressive of their views of the matters therein referred to:

1. *Resolved*, That the verdict of the jury recently rendered in the Hardin County Circuit Court, by which Matt. F. Ward was declared innocent of any crime in the killing of William H. G. Butler, is in opposition to all the evidence in the case, contrary to our ideas of public justice, and subversive of the fundamental principles of personal security guaranteed to us by the constitution of the State.

2. *Resolved*, That the criminal laws of this Commonwealth should be so administered that every citizen may feel secure from insult, injury and violence, both in person and occupation, and that the omnipotent power of public opinion should at once be so directed as to discountenance and condemn all attempts to thwart the ends of public justice, and to cause the practical realization that manslaughter is, in fact, the highest crime known to society.

3. *Resolved*, That the published evidence given on the trial of Matt. F. Ward, shows beyond all question that a most estimable citizen, and a most amiable, moral and peaceable man has been wantonly and cruelly killed, while in the p

formance of his regular and responsible duties as a teacher of youth; and notwithstanding the verdict of a corrupt and venal jury, the deliberate judgment of the heart and conscience of this community pronounces that killing to be murder.

4. *Resolved*, That the charges of vindictiveness and cruelty preferred against the citizens of Louisville by a portion of the counsel for the defence of Ward, is a vile and unmerited slander, and we proclaim that each and every imputation cast upon our esteemed fellow citizen, Dr. D. D. Thomson, and our neighbors' children, the pupils in Professor Butler's school, is utterly groundless and unjustifiable.

5. *Resolved*, That the public press of this Commonwealth should be so conducted as to be recognized as the conservator of public morals, and that a failure of any portion of the press to rebuke and condemn an atrocious crime against society, tends to debauch the public virtue and to destroy the public morals.

6. *Resolved*, That in the death of Wm. H. G. Butler, his family have lost a most devoted, affectionate, faithful son, brother, husband and father; the cause of education a most accomplished friend and advocate, one whose talents and acquirements placed him in the front of his useful and honorable profession; and that society has lost one of its purest and best members, whose life is unspotted by a single blemish—as gentle and noble a spirit as ever breathed.

7. *Resolved*, That in token of our respect and affection for, and as an evidence of our appreciation of, W. H. G. Butler, we will at once take measures for erecting a monument to his memory, and to present his widow a substantial token of our regard for her.

8. *Resolved*, That we regret and condemn every manifestation of disorder, and we exhort all good citizens by their reverence for law, by their own self-respect, and by their love of the virtues of him whose loss we deplore, to abstain from violence to persons or property, and from every disregard of law and order—remembering that society cannot exist without order, and that he whom we revered when on earth, was incapable of meditating harm to any one, and that every wrong committed will wound his pure and lovely spirit.'

So soon as the resolutions were passed, the Committee retired with them to the crowd below, where they were

read by Sherrod Williams, and carried with equal unanimity. *After the Committee left the meeting above*, resolutions were moved and carried, requesting the two Wards to leave the city ; inviting Matt. Wolfe to resign his seat in the State Senate ; and requesting John J. Crittenden to resign his place in the Senate of the United States, to which he was elected by the Legislature of Kentucky last winter.

By a portion of the immense crowd outside, *another meeting* was organized, by which *another* series of resolutions was passed, equally condemnatory in their tone with those passed by the regular meeting in the Court House, as to the trial, and the verdict, and much more sweeping in their references to individuals who had rendered themselves obnoxious in different ways by their connection with the trial, several of whom were singled out by name for public censure.

By a large number of persons in the Court House yard, after the regular meeting in the west room had adjourned, effigies were hung up and burned, of Matt. Ward, Barlow (the false witness), and numbers of the Hardin County jury and a number of other persons, who, by their acts, had subjected themselves to the deep displeasure of the people of Louisville.

Earlier in the evening a crowd of men and boys gathered in front and at one side of the private residence of Robert J. Ward, doing considerable damage to the conservatory with stones, and with the same missiles breaking some of the front windows. While this was going on, effigies of Matt. and young Robert Ward were strung up in front of the door. These were afterwards set on fire, when some person unknown caught one of them up and threw it against the front door, which was thus set on fire. The alarm was at once given, several engines were soon on the spot, and after encountering a somewhat decided but by no means stubborn opposition from the men and boys near the house, the flames were extinguished."

"As the closing sheets of this report go to press, a week has passed since these occurrences took place. No one pretends to excuse or defend the lawless depredations committed upon the private residence of Robert J. Ward. Every good man condemns them as wrong, uncalled for, and reprehensible, but the heart of the whole city beats as one pulse, and nobly responds to the manly, decided, and conservative tone of the series of resolutions embodied in this

closing narrative, as passed by the meeting of citizens as held in the Court House."

It may suit the purposes of the reviewer to confound with the proceedings of a mob the passage of these resolutions; to pronounce our description of the meeting which passed them "a vile slander on the citizens of Louisville;" to represent the account we have quoted as a gross perversion of the truth; and to exhibit the dignified spirit in which eight or ten thousand men expressed their abhorrence of a trial, the result of which they felt had disgraced their State, as the ebullitions of malignity and prejudice emanating from a partisan source. But "there is a holy mistaken zeal" in friendship, "as well as in religion," and calm observers will perceive in this attempt only the rashness of an unscrupulous advocate or the desperate necessity of a feeble cause.

If it be, as the reviewer says, "a statement *utterly* destitute of truth" (although his own account and that we have copied from the Cole report prove it to be otherwise), "that deputations and addresses from all parts of the State have urged Mr. Crittenden to resign his seat in the United States Senate," the citizens of Kentucky have probably saved themselves useless trouble. If it be untrue "that a society in a neighboring State withdrew its invitation to him to officiate upon some public occasion"—we rejoice that the society did not, by its own fault, lose an address which would undoubtedly have been an interesting and a learned one; if a convention of medical gentlemen in St. Louis did *not* so far "forget their self-respect as openly to insult him," we rejoice most heartily that the imputation is removed from a portion of that useful, honorable and noble profession.

The statements we made were founded upon information continually appearing in the newspapers of the day, and were then, and are now, generally believed to be true. But we lay no stress upon them. Their truth or falsity in nowise affects our main position, that, by a not unnatural process of the human mind, public indignation at the escape of a prisoner whom the universal heart of the nation declares to be a murderer, turned itself against the counsel for the defence, and especially against the only one whose name was known beyond the borders of his native State. This indignation then existed and still exists in Kentucky. It may, upon the memorable evening when the resolutions

were passed, as the reviewer asserts, have been expressed against Mr. Crittenden, solely because he volunteered—but if, now that his course upon that trial is fully understood, not only “from the partisan source which so perseveringly and malignantly misrepresented him,” but from the statements of persons who were present, and more than all, from the report of the trial to which Matt. Ward himself appeals—now that his cruel attempt to destroy the reputation of an innocent man to secure the acquittal of a cold-blooded assassin, has been exhibited before them, that indignation shall not gather force and permanence, we shall believe, in the language of the resolutions, that public virtue is already debauched, and public morals already destroyed.

We turn now to the comments of the reviewer upon that incident in the trial, which, next after the verdict, most deserves reprobation. We allude to the admission of Robert J. Ward, Jr. as a witness for his brother.

The title of the case, as given in the New York report, is *Commonwealth of Kentucky v. Matt. F. Ward & Robert J. Ward, Jr.* The indictment charges Matthews F. Ward with murder in the first degree, committed on William H. G. Butler, on 2d Nov., 1853, by shooting him with a pistol, the ball of which took effect in his left breast, and caused his death on the 3d Nov. Robert J. Ward, Jr., is charged with *aiding and abetting* in the second count, and *as a principal* in the first count of the indictment, p. 7. “Mr. Helm moved that the prisoners be tried separately. The court granted a severance, but left to the Commonwealth’s Attorney the privilege of deciding which of the defendants should first go to trial. The prosecutor desired that Matthews F. Ward, as the principal in the case, should be tried first. The defendant entered a plea of Not Guilty.” p. 8.

Robert J. Ward, Jr. was not discharged from custody until after the acquittal of his brother, when a *nolle prosequi* was entered in his case.

While, therefore, the indictment was pending against Robert J. Ward, Jr., *as a joint principal* with his brother, the defence moved for leave to introduce him as a witness in behalf of his co-defendant. This motion was opposed by the government, and after elaborate argument on both sides, the court admitted him to testify.

In commenting upon this ruling, we used the following language: “Perhaps the counsel understood the court as

well as they understood the the inclination of the jury, and hence a ruling disgraceful even to a court of '*Kentucky justice*.' We do not propose to argue the incompetency of this witness. No lawyer can have a doubt upon the point. The responsibility of such gross departure from the plainest principles of law rests between Mr. Crittenden who urged, and the judge who allowed it."

To these positions the reviewer replies that "the judge, upon full argument, before the occurrence of this case, had decided the question the same way."

Before proceeding to the remainder of the reviewer's reply, we must notice a remarkable fact connected with the introduction of Robert Ward as a witness, which does not appear in the New York report. Robert Ward was not offered as a witness till the *fourth day* of the trial. At the close of the *third day*, Mr. Caldwell, one of the nine counsel for the prisoner, stated that "the defence had *closed their testimony*, but, as it was near night, and they wished an opportunity to consult, he would ask the court to adjourn till morning." (Cole Report, p. 48.)

Upon the morning of the fourth day, Mr. Wolfe stated that the defence wished to call some more witnesses. Accordingly John Judt was produced, for the purpose of contradicting "little Pirtle." Then R. W. Adams was called, and was asked, "If he ever knew Matt. F. Ward to purchase pistols and have them loaded at different times before this occurrence." The question was not allowed, and this witness did not testify. Then Mr. Crittenden said he "wished to prove by Mrs. R. J. Ward, that in a conversation that occurred a month or two before this transaction, Mr. Sturgus, the assistant teacher, had become so excited against Matt. F. Ward, as to leave a hostile and threatening letter with the mother, and requested her to deliver it to the son." (Cole Report, p. 50.) This testimony was also rejected. Then Mr. Crittenden said that he wished to introduce Robert J. Ward, Jr., as a witness, and his testimony closed the evidence in chief.

We give this narration as showing that the introduction of R. J. Ward, Jr., was an after-thought. It is impossible to believe that *nine counsel* were, all of them, ignorant of the testimony he was ready to render—or had forgotten the only witness who could bring "order out of disorder," and discovered their omission only upon consultation after having closed their case. It is evident that they

placed this witness in the same category with the other evidence which they offered upon the same day. They made a bold attempt to introduce incompetent testimony, failed in two instances and succeeded in a third, and the remark that we made, without intending any imputation upon the integrity of the judge, but which we hazarded as a mere conjecture that the counsel *understood* the court¹ as well as they understood the inclination of the jury, is fully sustained by the reviewer, who says that the same judge had decided the same point the same way upon a previous occasion. It is not unlikely that this decision, not "spoiled by being printed in a book," was first made known to Mr. Crittenden upon this consultation.

To our strictures upon this ruling, the reviewer further replies: "Admitting that the decision was wrong, we put it to the candor of every impartial mind to say, if Mr. Crittenden would not have failed in the discharge of his duty to his client if he had not argued the admissibility of this evidence, and left it to the judge to decide. But we hold that the decision was right, notwithstanding the broad assertion that no lawyer can have a doubt on the point, and that it was in strict accordance with the long established course of adjudication in the State of Kentucky." "Our courts, governed as they have been by the genius and spirit of our institutions, have never hesitated to admit witnesses to testify upon oath in behalf of the defendant, and as an accomplice jointly indicted could testify for the commonwealth, in the same liberal spirit he was also held competent for the defendant *when not jointly tried with him*.² It is conceded on all hands, where there are separate indictments, that an accomplice is a competent witness for the defendant. Our courts, however, have decided that his incompetency cannot depend upon the will of the Attorney for the Commonwealth, in drawing up a separate or a joint indictment.

¹ The Reviewer's sensitiveness in regard to this phrase, is amusing. We have heard it said of a distinguished advocate at our own bar, that before his argument in any case, was half through, he could almost always make up his mind correctly which way the jury were inclined. We have no doubt that the counsel for the defence in Ward's case, fully understood the inclination of their jury. It would be otherwise difficult to reconcile some of their declamation with the possession of even a moderate share of common sense. What account, for example, could be given of Mr. Marshall's disquisition on the strap? Or of Gov. Helm's legal distinction between horse pistols and pop-guns? Or his conclusive argument that a "man of honor and a gentleman" would not commit a deliberate murder?

² We hope there is some mistake here in the reviewer's account of the reason of the decisions — which seems to be that because a prisoner was admitted to testify *against* himself, in the same *liberal spirit* he was held competent to testify in his own favor! Even we have a better opinion of Kentucky courts, than to credit this.

These decisions have been rendered by Circuit Courts it is true, as there has been no appeal in criminal cases until very recently, in Kentucky."

"It is possible, though we know of no case, that there has not been perfect uniformity with all our Circuit Courts upon this point; but it was shown in the argument of this case, that such had been the current of decisions, and Judge Kincheloe, when first deciding it, did it upon the authority of a decision of his predecessor."

We are not disposed to modify in any degree our opinion of this ruling. In our original article we extracted from the New York pamphlet the whole of what was there reported as having occurred upon this motion. The more detailed account of the arguments and decision, which is contained in the Cole report renders this ruling the more inexcusable.

We maintain that not only no lawyer but no student of very moderate reading in the law of evidence, can doubt that Robert J. Ward, Jr. was an incompetent witness by the rules of evidence as admitted and practised upon in any court recognizing the principles of the common law. Argument on this position is useless. No court out of Kentucky would now suffer the public time to be wasted in the discussion of a principle so well established, and so long and universally acceded to. We are perfectly willing to abide by the intelligent and unprejudiced judgment of the profession upon the correctness of this position. This rule of the common law was abundantly shown by Mr. Gibson, upon the argument, by citations from the reports of New York, New Jersey, Connecticut, Pennsylvania, Mississippi, North Carolina and Tennessee. To which might have been, and probably were added, many English cases, and one in Massachusetts directly to the point, viz.: *Commonwealth v. Marsh & Barton*, 10 Pick. 57.¹

¹ As an instance, and probably an illustrative instance, of the reviewer's use of authority, we adduce his citation upon page 556, from 1 Greenleaf on Ev., § 379. The reviewer cites as follows: "It is a settled rule of evidence, that a *particeps criminis* is not on that account an incompetent witness, so long as he remains not convicted and sentenced for an infamous crime. The admission of accomplices as witnesses for the government, is justified by the necessity of the case. The usual course is to leave out of the indictment those who are to be called as witnesses; but it makes no difference as to the admissibility of an accomplice, whether he is indicted or not, if he has not been put on his trial at the same time with his companions in crime. He is also a competent witness in their favor." There the quotation ends; but not so the text, which proceeds without the full stop, and reads thus: "He is also a competent witness in their favor; and if he is put on his trial at the same time with them, and there is only very slight evidence, if any at all, against him, the court may, and, as we have already seen, generally will, forthwith direct a

After this array of authorities, well might Mr. Gibbs have exclaimed that "this was the first time in his experience that a motion was deliberately made to throw aside the books, all authorities, all precedents, and trust to the mere personal opinion of the judge." (Cole Report, 52.

Mr. Crittenden was no stranger to these authorities. 1851, while Attorney General of the United States, he himself argued the precise question before the Supreme Court in the case of the *United States v. Thomas Reids and Edward Clements*, 12 Howard, 361, and had succeeded in maintaining the *exclusion* of the witness.

The defendants in this case were jointly indicted for murder, committed by them on the high seas. By permission of the court below they were separately tried. Upon the trial of Reids, he proposed to call Clements as a witness in his favor. The court rejected the testimony, being of opinion that, as he was jointly indicted with the prisoner in the other trial, he was not a competent witness. Reids was found guilty.

At a subsequent day, he moved for a new trial upon the grounds, of which the first was, that the testimony of Clements was improperly excluded.

Chief Justice Taney, in delivering the opinion of the court, said, that "the difficulty in this question arose upon the construction of the Act of Congress of 1789. By a statute of Virginia, adopted in 1849, it is provided, 'that a person who is not jointly tried with the defendant, shall be incompetent to testify in any prosecution, by reason of interest in the subject matter thereof,' " and the court decided undoubtedly with much assistance from the learning and ability of Mr. Crittenden, although his argument is not reported, that the rules of evidence in criminal cases in courts of the United States are the rules which were in force in the respective States when the Judiciary Act of 1789 was passed, and that a State Act, subsequently passed, would *proprio vigore* alter those rules in the United States Courts, and, therefore, as Clements was an incompetent witness under the law of Virginia, at the time the Act of 1789 was passed, the State Act of 1849 could not render him competent.

The Judiciary Act was approved Sept. 24, 1789. K

separate verdict as to him, and, upon his acquittal, will admit him as a witness for the others." Mr. Greenleaf refers here to § 363, where he states, "But the interest is not considered as at an end, so as to render one defendant a competent witness for another, by anything short of a final judgment."

tucky was then a part of Virginia, and was erected into a Territory, Dec. 15, 1789, and admitted into the Union, June 1, 1792. Thence it follows, that the same law of evidence prevailed in Kentucky as prevailed in Virginia when the Judiciary Act was passed, and as still prevails there in the courts of the United States.

This common law rule of evidence is not shown by the arguments or decision in the Ward trial to have been altered or abrogated in Kentucky by any statute, or by the judgment of any court.

The Cole report gives the following synopsis of Mr. Crittenden's argument: "The defence were no strangers to these authorities. But it was a general rule, admitted and established by all the books, that if the indictments were separate, persons indicted for the same crime could be witnesses for each other. Now the fact that they were impleaded in the same indictment, made no difference in principle, and, if a person could be admitted in one, he ought in the other. The fact that their names were on the same piece of paper, instead of different pieces, ought not to exclude the witness. Such a construction would be a poor commentary on the common law. But there were higher and older authorities than the gentleman read, which were on the other side, and which, he contended, placed the question of admitting the witness on the simple ground of his moral competency, and not on a mere matter of being jointly indicted. He also referred to two cases, decided in this State, which supported his view, and said, "Here are two *American* authorities, yea, what is more, two *Kentucky* authorities, showing how *Kentuckians* had decided the point. There were some crimes which it required more than one person to commit, as a riot. In such cases, there was a community of guilt, and whether the criminals were indicted separately or jointly, they would not be witnesses for each other. But where the crime could be committed by one, this reason for excluding another impleaded for the same crime did not exist. He commented severely on the opinion of Lord Ellenborough, that the jury would be imposed on by an accomplice, and vindicated the ability of the jury to discriminate between truth and error."

This argument is not based on the peculiarities of the Kentucky law, but upon the general principles of the common law. The only part of it which can raise a doubt as to the rule of evidence in that State, is "the two *American*

authorities; yea, what is more, the two *Kentucky* authorities, showing how *Kentuckians* had decided this point."

To these citations Mr. Gibson opposed another, "not spoiled by being put in a book. He referred to the case of the two Kelleys, tried in Hart county, where the judge refused such a motion. There was also another objection to this admission. R. J. Ward, Jr. was indicted as an accessory, and his testimony might acquit the principal, and of course himself." p. 52.¹

"Mr. Riley referred the court to a case in this county, where an accomplice had been admitted as evidence."

"The judge said the majority of Kentucky decisions was in favor of the admission of the witness. The weight of English decisions was against it, but they had been much modified by practice, and were originally founded on technicalities. The object of a trial was to ascertain the guilt or innocence of the prisoner, and all evidence not directly inadmissible, ought to be admitted. The practice was different in different States, but Kentucky decisions were in favor of the admission. The credibility of the witness must be left to the jury."

From this account of the proceedings it abundantly appears: 1st. That the common law rule of evidence, excluding Robert Ward as a witness, was fully sustained by citations from the English decisions and from those of many of the most respectable and learned tribunals in America. 2d. That the rules of the common law prevail in Kentucky, unless abrogated or altered by some statute or a judgment of a court. 3d. That no statute making the alteration was cited for the defence, whence it is safe to conclude that no such statute exists. 4th. That no decision controlling the judgment of inferior tribunals, has ever settled the point in that State; and 5th. Had the witness been excluded, the ruling could have been revised by the Court of Appeals, which the reviewer informs us is now established. But in this great trial, upon which the attention of the whole country was intently fixed, — where, as Mr. Gibson says, the audience were millions of freemen, who were watching with breathless interest its result, to sit in judgment on the verdict, a single judge of an inferior

¹ In *Dougherty v. Dorsey*, 4 Bibb, 207, decided in 1815, by the Kentucky Court of Appeals, the marginal note is: "In a joint action of trespass against several, who sever in their defence, they cannot demand separate trials for the purpose of using a co-defendant as a witness. If no evidence is given against a defendant, he may be introduced as a witness."

tribunal, admitted the testimony of a witness unquestionably incompetent by the common law rule of evidence, as existing in Kentucky, who would testify directly in his own exculpation, not because the judge himself appeared to be convinced of the propriety of his admission, but because *a majority* out of four *nisi prius* decisions of inferior courts, of binding authority upon no one were in favor of it; thus settling for this important cause the gravest question of law occurring in it, upon the same principle as the moderator of a town meeting decides a proposition before the people.

There can be but one opinion out of Kentucky upon the character of this decision. It was a gross perversion of the law. No judge of an inferior tribunal, sitting in such an important cause, was justified in so deciding the point as to preclude the possibility of its revision by the Appellate Court.

This perversion of the law, and the unjustifiable use made of the testimony thus illegally introduced, we said, and still believe, may in part account for the general indignation felt and expressed, not in Louisville alone, but throughout the country, against the counsel for the defence, and more especially against Mr. Crittenden, as the most conspicuous and best known amongst them.

The only testimony in the case that Matt. Ward entered the school-room with his hands by his side, was that of Robert, who testified distinctly and exactly to that "most important fact."

Mr. Gibson says that Knight, Benedict, Pope and Crawford all swear that Ward had his right hand in his pocket when he entered the room, and kept it there "till he drew the pistol and fired." In the N. York report Mr. Crittenden is represented as saying, "It was the *general* evidence of the school-boys that Ward entered the house with his right hand in his pocket, and gesticulated with the fingers of his left." p. 144. In the Cole report, the statement by Mr. Crittenden is, "The boys *all* say that Matt. Ward came into the school-room with his hands in his pocket." p. 145. Here, then, were thirteen witnesses testifying to a prominent and startling fact, going very far towards the proof of express malice. Differing upon other facts, they agree without contradiction upon this fact. One witness against thirteen. One witness, with the strongest possible motive to testify untruly, against thirteen witnesses without the remotest personal inter-

est in the result of the trial. One witness, a boy of nineteen years of age, having, as it were, the reputation of his whole family dependent upon the statements he was about to make, not only standing between his brother and an ignominious fate, but testifying essentially in his own favor, whose manner upon the stand is described by Mr. Carpenter as "very much unlike that of a truthful witness," "ready, willing and swift, and, with a swaggering air, boasting that he had carried arms since he was fourteen years of age," (Cole Report, p. 70,) was to be sustained in his testimony, although directly and flatly contradicted by that of thirteen witnesses, "honest, manly, open-hearted boys, whose countenances alone would win them credit in a land of strangers—boys old enough to see, and understand, and remember facts, but too young to have been contaminated by intercourse with the world, too honest to speak falsehood, too guileless to conceal truth," ignorant of evil, innocent in their lives, and of the highest moral training that Louisville could afford.

The testimony of these boys must be destroyed, or, in all human probability, the prisoner would be convicted. To impeach their veracity was utterly a hopeless task. Although the reviewer asserts that there was no disposition to denounce all the scholars as perjured, as we "very illiberally insinuated," it was not, as the counsel for the defence all unite in showing,¹ until after the strenuous attempts

¹ Mr. Carpenter says: "Efforts were made by the learned counsel to impeach indirectly these young men, by asking them: Did you not tell Dr. Caspari and others that Butler struck Ward first? But when the doctors and others referred to came upon the stand, a contradiction was not even attempted." Cole Report, p. 63.—Again: "And now must all these young men of Louisville be swept down, must their reputations be blasted, that this prisoner may live and flourish, and upon such testimony? But they disavow such an attempt. They have manifested their willingness, but are afraid to strike the blow—they do it by innuendo." Id. 72. Mr. Gibson says: "Never, perhaps, did attempts to impeach witnesses encounter more signal failure. So hopelessly has it failed, that counsel with a boldness that, in a better cause, would be worthy of admiration, now deny that they have attempted to impeach them at all. I will never complain of attempts to impeach a witness where any ground exists to base the attempt upon. But to attempt to confuse a witness by intimating to him that he has told a different story out of court, and asking him if he has not told this or that man such and such a story, when the counsel know that they have no evidence that he has, would be a most unfair course towards a man of good character. It certainly acquires no additional merit from being practised on boys." Id. 105. Mr. Allen says: "Gov. Crittenden tells you he believes in blood. So do I; and I know these young men—I know their antecedents and their ancestry—I know they are of all grades in life; but many of their fathers hold high places, and are not only distinguished for rare abilities, but for possessing all the social and manly virtues. Do you believe the children of such parents came here to perjure themselves? Though the gentlemen admit their universal good character, they stab that character a moment after, by stating that they consider them boys who can be taught to believe and testify to what is false." (N. Y. Rep. 162.) Probably the reviewer, in the "hurry and fervor of argumentation," suffered his understanding to be the dupe of his imagination.

made to destroy their credit for veracity had signally failed, that the alternative course was adopted of attacking only the correctness of their testimony. Then, indeed, all intention of impeaching their veracity was carefully disclaimed. Mr. Crittenden would not even allow that he has represented them as *simple*, but only as "*mised.*"

The course finally adopted was to impeach, not the veracity of witnesses, but only the correctness of their testimony; to contend that the whole of it was to be disregarded in favor of Robert J. Ward, Jr. This "is the only testimony which has brought order out of disorder — given the only connected and reasonable account of the whole affair — a consistent history of the events that transpired — natural in their course and leading directly to the results that actually occurred." (N. York Rep. p. 135.) This, we say, was contending that Robert Ward was the "only witness worthy of belief," and although the reviewer excepts to the phrase and views it as evidence of the "prejudice which dictated our whole article," such special pleading is rather captious than convincing.

Although Mr. Crittenden chose to represent these thirteen witnesses as a mere "set of boys" from eleven to eighteen years of age, while, in fact, the youngest was thirteen and the eldest twenty, or one year older than his own immaculate witness, and two others were but a single year younger, we did not object to the use he made of this witness's evidence in exalting it over that of the boys. We made no complaint of that extraordinary course. On the contrary, we fully admitted that "it was fair enough thus to comment upon testimony in some respects undeniably conflicting." We are not disposed to deny, on the contrary readily admit, that it is not only the right, but the imperative duty, of counsel in any cause, civil or criminal, to "make becoming and proper comments upon testimony," "however pure may the source whence such testimony flowed." It is precisely because the comments made were not becoming and proper, but, in our estimation, highly unbecoming and improper in any advocate, and especially in an advocate of Mr. Crittenden's high character and great personal influence, that they "called forth" what the reviewer is pleased to term our "most unqualified and bitterest denunciation." It was the gross, unjustifiable and slanderous attack upon the character of Mr. Sturgus, growing out of the theory of the defence that the boys were not to be believed, and that Robert Ward

was; it was this use of his testimony which we pronounced and still consider utterly derogatory to the dignity of the profession, because it could not have stood for one moment before an intelligent and honest jury, unless by the aid of this atrocious attack upon Sturgus.

This "denunciation" we applied to all the counsel for the defence. That our readers might judge for themselves of the true character of the assault, we quoted in full the passages where it occurred. Each reader, therefore, could judge for himself whether our statement of it was correct, or, as the reviewer chooses to say, was "a false representation of its character." We are content to place his explanation side by side with the arguments of the counsel, and to abide by the judgment of any high-minded, unprejudiced person within or without the limits of Kentucky, whether, when Mr. Crittenden reminds the jury "that these boys, since the occurrence of the principal fact they were investigating, have been the scholars, and *under the tuition and training of Mr. Sturgus* ; when he declares that the jury "will see the *impossibility* of a fair and faithful narration of the event from them *under such circumstances* ;" when he says, "this man, *they not knowing it*, by a word *properly* thrown in," not as the reviewer quotes, "by a word thrown in," but by a word *properly* thrown in, "and a statement *repeated until they were familiar with it and received it without question*, may have exercised great influence and control over the *feelings and recollection* of these boys ;" when he asks, "is it not probable that, *instigated by his enmity to the Wards, he advised Butler to refuse all explanation and investigation* ;" when he asserts that Butler was prompted to this course "by the *sinister, subterranean motives of another man who desired to minister to his own anger and ill-feeling* ;" that "it was not like Butler to answer haughtily, 'I am not to be interrogated,' but that it *was like Sturgus* ;" when he further asserts that "a strong imagination has supplied the place of a strong memory, — the boys have been *trained, influenced unconsciously*, — *Sturgus was sore toward the Ward family* ;" when he solemnly asseverates that Sturgus was the enemy of Ward, and was "by that enmity, as I verily believe, the cause of the *unfortunate event which occurred*," we ask any man to say whether the counsel did not argue "that Sturgus, moved by demoniac hatred towards the whole Ward family, first advised Butler to refuse the explanation, and then instilled

into the minds of his pupils, by artful insinuation and cunningly contrived observations, the belief that the fact they testified to was true, he himself all the while knowing it to be false?"

Will any man believe, that if such feelings rankled in his breast, if he were urged by the impulse of such cowardly and savage revenge, Sturgus *could*, as the reviewer intimates, *honestly* have exercised the influence attributed to him? Did not Mr. Crittenden "describe Sturgus as the *dark mover behind this scene of iniquity.*" Did he only "*philosophize on the influence*" which Sturgus could exert by "a word thrown in or a statement repeated," when he told the jury "you well understand how this man, they not knowing it, by a word *PROPERLY thrown* in or a statement repeated," would control their *feelings* and recollection? Is it not an inevitable conclusion, was it not the conclusion which Mr. Crittenden intended the jury to draw, that "there *was* moral depravity in Sturgus doing this," when he solemnly asserted it to be his belief, that the enmity of Sturgus was the cause of Butler's murder, which he mildly described as the "unfortunate event which occurred." Will any one, *can* any one believe with this reviewer, that, with the motives attributed to him, Sturgus did or could exert his power over these artless boys "*honestly*," or "under the full conviction that he was in no way departing from the truth of the case, and thrown in words and repeated statements which *he believed to be true*?"

When, further, it shall be remembered, that throughout this case, there was no evidence that Sturgus entertained the slightest enmity towards any member of the Ward family, (incredible as this may appear, it is the testimony of both reports) that the only semblance of foundation for the gross assumption upon which the attack was based, is the solitary unsupported statement of Mrs. Ward, "*you know Mr. Sturgus is your enemy*," made to the prisoner in a moment of great agitation, just before he started on his murderous errand—that testimony to prove this enmity, was offered by Mr. Crittenden, and rejected by the court—that Sturgus was not summoned to testify against Matt. Ward, because he knew nothing of the killing,¹ but only against Robert, who was not on trial,

¹ The testimony of Mr. Sturgus on the "examining trial" was as follows: "He was in the recitation room; saw the boys congregating at the glass door of the room which looked into the school-room. He called the boys back, and just

and before the prosecution knew that there would be a severance in the trial — that this explanation was made by Mr. Gibson before Mr. Crittenden addressed the jury, — we ask, when these things are considered, if any right-minded man will say that the attack upon Mr. Sturgus was not atrocious, inconsistent with the character of a high-minded advocate, derogatory to the dignity of the bar, and repulsive to the sense of justice inherent in every honest heart?

If the doctrine of Lord Brougham, "that an advocate, by the sacred duty which he owes to his client, knows, in the discharge of that office, but one person in the world, and none other — to save that client by all expedient means — to protect that client at all hazards and costs to all others, and among all others to himself — is the highest and most unquestioned of his duties; and he *must not regard the alarm, the suffering, the torment, the destruction he may bring upon any other,*" — if this be received as the morality of the profession, if a lawyer of national reputation and commanding personal character, who has been accepted by the world as a representative of American genius, American education, and American morals — if it be right for such a man upon any occasion, to descend from his elevated station into a mere combatant for forensic triumph, to oppose, in the earnestness of his struggle, the principles of law, which, as the highest legal officer of the nation, he had before successfully maintained, and, without evidence or apology, to put forth all his strength to destroy the character of an innocent and unoffending man; then, perhaps, Mr. Crittenden's course on this trial may be defended, and his efforts add new lustre to his fame. But if "one should bear in mind the agony which he may be inflicting in every word that is uttered upon a person of spotless integrity, and of the highest delicacy of feeling, whose conduct one may have totally misunderstand, of whose real motives one is altogether ignorant," and therefore should not "recklessly endeavor to expose such a person to the ridicule, scorn, and hatred of his friends and the public, and inflict upon his

then he heard a pistol fire, and stepping into the room, saw Mr. Butler stagger and fall, and saw some one, supposed to be Robert Ward, flourishing a large knife. He turned to Mr. Butler, who fell on a settee, and he was fearful he would die before a physician could be called, and his nearest way was through a window, which stood open, and he went out for Dr. Caspari. He further stated that Mr. Butler had whipped William Ward, a small lad, one of his pupils, the morning previous. (Cole Report, pp. 5, 6.)

character injury *irreparable*,"¹ — then before the calm common sense of the people, over which sophistry is powerless, in that moral judgment of honest men, which casuistry cannot deceive, Mr. Crittenden will receive, as he has already received, stern and uncompromising censure.

In speculating upon the causes which might have produced the lamentable verdict in this trial, we suggested that one cause might be, the "entire doubt in which the jury was left as to the principles of law applicable to the facts." Propositions in our opinion extraordinary, and we are inclined to believe, equally so in the opinion of any lawyer out of, and of most lawyers in Kentucky, were advanced as law by the counsel for the defence. Not having then seen the arguments for the prosecution, except that of Mr. Allen, upon perusing the reports of them as contained in the Cole pamphlet, we perceive that we did injustice to the great ability displayed in those masterly efforts, when we observed that the propositions of the defence were denied by the government, and the true doctrines expounded with no great force of illustration, but still with general distinctness." On the contrary, the correct law was most ably urged by all the counsel for the government, and especially by Mr. Gibson who applied it to the facts with consummate skill and clearness. This correction, which we take great pleasure in making, only adds force to our remark that, "left in this position, the jury must rely upon the court to dissipate the fog or acquit the prisoner, because they doubted on the law." We added, that "in this great Kentucky cause, the presiding judge made no charge worthy of the name, and did nothing to remove the mystification into which the minds of the jury were inextricably thrown."

The reviewer thus comments upon these passages of our article: "You assume that it was the duty of the judge to give a charge to the jury, and then contrast what was said with a charge delivered by the excellent Chief Justice of your own Supreme Court, occupying more than two hours. When you learn that a judge is not allowed to charge a jury, either in a *civil or criminal* case, in Kentucky, you will doubtless be ready to acknowledge the gross, and we may add, the 'atrocious' injustice you have done Judge Kincheloe."

In support of the position that a judge *is not allowed to*

¹ Warren's Law Studies, pp. 867, 868. The whole of paragraph No. I, c. 19, is commended to the reviewer's careful study.

charge a jury, the reviewer's advances sundry arguments, apparently sustained by various citations, and then winds up with the following emphatic declaration: "From this brief view of what is considered the right and duty of a judge in Kentucky, you cannot fail to perceive how gross and outrageous has been the injustice done to one of the purest judges, and best men, who ever adorned the judicial station."

We profess to know little about the peculiarities of Kentucky law, beyond what is contained in the article before us, and the two reports of the trial. Were we not credibly informed that the review was written by a lawyer, its character would rather incline us to the opposite belief. But we accept the statements made by the reviewer as evidence of what is Kentucky law upon this point. We cannot, however, admit this evidence as conclusive, and must still be permitted to doubt, whether the presiding judge performed his duty upon the trial in suffering the case to go to the jury with no attempt to explain the principles of law applicable to it, and without even an authoritative definition of malice.

Our reasons for not accepting, unquestioned, the reviewer's *ex cathedra* exposition of Kentucky law, are the following:

1st. We find Mr. Gibson, a lawyer of that State, proved by his argument in the case, to possess eminent abilities, when about to lay down "the uncontrovertible principles of law upon which," as he conceived, "this case must rest," adds: "*I lay down these principles under the eye of the Court.*" What did Mr. Gibson mean by this assertion, if the judge had no right, if it were not his duty, to correct the law thus stated, if it were wrong?

2d. We find the prosecuting attorney, who is presumed to be an able lawyer from the official station which he fills, and who, as far as we are informed, is acknowledged in Kentucky to be such, saying to the jury in one part of his closing argument, "You are sworn to try this case, and to form your verdict according to the written laws of your country, *expounded by this Court* and applied to the testimony by your own understanding"—and in another part, "I believe you fully understand the law which applies, and if *I have misstated it on any point, I am sure that his Honor will not neglect to correct it in his charge.*"

3d. The judge himself contradicts the reviewer, 1st. By

his own practice on the trial, inasmuch as he did deliver not one only but two charges,— one at the commencement of the trial, and the other at the end of it. 2d. In the first part of his last address, he not only lays no stress on the asserted prohibition of the law against judicial charges, but “conceives it to be his *duty* to direct” the jury’s “attention to the issues made in the progress of the trial,” adding, as a reason why he does not discuss “the various principles of law applicable, either directly or indirectly, to the facts proved in the case,” not that he is forbidden by law to do so — not for the anti-conservative, jacobinical reason advanced by Mr. Crittenden, that “the judge would lay down the law like a problem in Euclid, and by taking a scrap of law here and a scrap there, might sentence a man to death on a mere technicality,” while “the jury pass over all mere technicalities, and reach the substance of the case,” (Cole Report, p. 135,) but because “the usual practice, in criminal cases in this district, of reading and discussing the law before the jury, having been adopted *in this case*, relieves the Court of the necessity, and to some extent renders it improper” to do so.

The only escape from the conclusion deducible from this high authority, that it was the right of the judge to charge the jury on the law, if he chose to do so, is under the shelter of the subterfuge, “that no judge in Kentucky has ever attempted to charge a jury in a criminal case, either upon the law or the facts, “in *the sense in which a charge is here understood.*”

We do not deny that the paragraphs quoted from our article may be construed as containing an implied censure upon the presiding judge, against whose *uprightness and integrity* we never intended to make, and here emphatically disclaim the intention of making, the slightest insinuation. Whether, however, this implied censure deserves the epithets which the reviewer has chosen to apply to it, we leave to others to decide. The remarks, excepted to, were not made for the purpose of censure, but as offering the most charitable apology which occurred to us, for the verdict. Whether the court had or had not the right to charge the jury, “in the sense here intended,” or in any other sense, whether it were or were not his duty to do so, the *fact* remains true, that no sufficient charge was given; that nothing was said to instruct the jury upon the meaning of malice, which, “expressed or implied, is an essential ingre-

dient of this crime." If the judge be in truth prohibited by law from charging the jury either on the law or the facts in every sense — then, although he disregarded the law, he is obnoxious to no censure from us. If, on the contrary, as we are more inclined to believe, it was his duty to expound the law, and to afford the jury some rational and sensible basis upon which to investigate the facts, if not in the form of a technical charge, at least in some other form peculiar to Kentucky — then we can only say that a more striking exhibition of judicial inefficiency than the charge delivered, was never before made in a court professing to administer justice. In either case, it is equally true that the jury received no sufficient instruction, and may have acquitted the prisoner from the reasonable doubts which they must have entertained on the law, without rendering themselves liable to the charge of perjury which has been freely advanced against them.¹

Before leaving this subject, we must advert to the opening address to the jury, which was as follows :

"The defendant, Matt. F. Ward, has been arraigned, and has entered a plea of not guilty, throwing himself upon God and his country for trial. If you find him guilty, you will say so, and no more. If you find him not guilty, you will say so, and no more. *In case the killing shall be proved to have been done under the influence of passion, you can find the defendant guilty of manslaughter*, and will say so. Should it be proved that the act was done in self-defence, it is not an act of voluntary homicide, and you will find him not guilty."

We know not if this opening address from the court is required by the law or practice in Kentucky courts, but one feature of it is certainly remarkable. The indictment charges the prisoner with *wilful murder* in the first degree. But, in this address, the judge makes no allusion to murder. He directs the attention of the jury only to manslaughter, and voluntary homicide. This is a striking peculiarity in the administration of "Kentucky justice," as exhibited on this trial. Before any evidence had been heard, immediately after reading the indictment, the court not only omits to give the slightest intimation of what constitutes murder, not even pronouncing the word, but pre-occupies the minds of the jury, by announcing as law, the unqualified, and

¹ It has been stated that several of them have been indicted for perjury as jurors in this case.

therefore monstrous, proposition, that in case the *killing shall be proved to have been done under the influence of passion*, they could find the defendant guilty of manslaughter, and that if done in self-defence, it was not an act of voluntary homicide. We do not intimate that the judge intended to bias the minds of the jury, but only assert that such would not fail to be the effect of his opening address.

The standing of the parties committing this murder, the scene and boldness of its perpetration, and the character of its victim, attracted to the trial a greater share of public attention, than is usually bestowed on the local administration of criminal law. When it became known that Mr. Crittenden deemed the case so important as to volunteer in the defence, it assumed something of a national consequence. But no one doubted that in a State like Kentucky, public justice would be vindicated, and that, whatever the result, it would accord with the proof.

When the verdict was announced, the whole country was taken by surprise. The general astonishment was forcibly expressed in almost every newspaper which alluded to the trial. There were those, however, who suspended their judgment till an authentic account of the evidence and proceedings should afford them the means of a correct opinion. The New York report of the trial appeared, with the reputation of having been prepared by the friends of the prisoner, and was stamped with conclusive authority by the public appeal made to it by the defendant himself.

We first read the argument of Mr. Crittenden—attracted to it not less by his fame as an advocate, than by the accounts which had been given of the extraordinary positions he had assumed. We find him rejoicing, not that the prisoner was in a house of justice merely, but in a “house of Kentucky justice.” “The accused is before you in a house of Kentucky justice, and all vengeance must cease to pursue him at this threshold.” After reading the evidence as contained in this report, no *impartial* person could hesitate to say that the verdict was infamous; that there was not, from the beginning to the end of the case, a passably plausible excuse set forth for it. There never was a murder committed in any community for which so little could be said in extenuation, or which was so deplorably deficient in respectable or honest grounds of defence. It stands forth on the pages of this report in all its naked and hideous

deformity of a deliberately intended, preconceived, brutal assassination, without the pretext of even temporary passion.

But this shocking verdict was not the only illustration of the justice of Kentucky contained in that report. There are four other verdicts of similar atrocity, which, because the parties were in the humbler walks of life, attracted no attention until this trial exposed them to the public gaze. We mean the cases of Stout, Coon, Owen and Wilkinson, cited with approbation by Mr. Wolfe, in his argument, pp. 111, 112.

From these five cases Mr. Crittenden's phrase received a more than common significance, and we used it accordingly.

But Kentucky is alive to the disgrace she has suffered. We see in the honest and manly indignation expressed in the resolutions we have quoted; in the deserved and universal execration with which her *people* have received the verdict, which, however it may suit the partisans of the acquitted criminal to characterize as the emanation of malignity and prejudice, springs from the noblest impulses of the human heart, proof that the State which has produced the greatest statesman of the age—a statesman who has done more than any other man of modern times to elevate the character of the country—will yet redeem her reputation, and render “Kentucky justice” henceforth an honor, instead of “a by-word and reproach.”

NOTES TO LEADING CRIMINAL CASES.

COMMONWEALTH v. ROGERS.*

Insanity — Delusion — Uncontrollable Impulse — Evidence.

A jury is authorized to find that a party, who is indicted, was insane at the time of the alleged offence, if the preponderance of the evidence is in favor of his insanity.

THE jury, after being in consultation several hours, came into court and asked instructions upon these two questions :

* 7 Metcalf, 500. See Feb. Law Rep. We give here only the last marginal note, and the closing portion of this case.

"Must the jury be satisfied, beyond a doubt, of the insanity of the prisoner, to entitle him to an acquittal? And what degree of insanity will amount to a justification of the offence?"

In answer to the first of these questions, the chief justice repeated his former remarks on the same point, and added, that if the preponderance of the evidence was in favor of the insanity of the prisoner, the jury would be authorized to find him insane. In answer to the second question, the chief justice added nothing to the instructions which he had previously given.

The jury afterwards returned a verdict of "not guilty, by reason of insanity."

S. D. Parker, for the Commonwealth.

G. T. Bigelow and *G. Bemis*, for the defendant.

In our February number we spoke of two well-recognized tests of insanity, viz: inability to distinguish between right and wrong, and a delusion as to existing facts, which, if true, would justify the act alleged. But are these two tests always sufficient? Are there no crimes committed which may be excused, although not done under the influence of an insane delusion as to existing facts, or with an incapacity of knowing right from wrong? These two tests essentially apply to the *intellect*. But is man composed entirely of intellect? Has he not emotions, passions, propensities, and above all, a personal *will*, which may become deranged? Are there not other faculties and powers essential to an accountable being, besides those of mere intellect and sense? And are not these the distinguishing characteristics of *man* above the lower orders of animals?—Is not the agency and coöperation of the will, that self-originating and self-controlling power, belonging to man alone, necessary to give *character* to any act, and render it censurable or praiseworthy? If that will, therefore, be truly in subjection to a higher or a lower power than itself; if it be not free, uncontrolled, and without restraint, is its possessor chargeable with *guilt* for its operations? Is not therefore, the power of *choosing* right from wrong as essential to legal responsibility, as the mere capacity of *distinguishing* between the two?

If a person's power of controlling his thoughts, words and actions, is really destroyed or suspended, from the effect of a disordered or diseased mind, why should he be responsible for his acts, although his intellect may not be so far impaired that it cannot discern his conduct to be contrary to the law of God and man? If in ethics free will is essential to moral accountability, why should not the power of control over one's actions be necessary to render man amenable to human punishment? Any act, to be criminal, should be voluntary. *Actus non facit reum, nisi mens sit rea*. Why is the wife who commits a misdemeanor in the presence and by command of her husband, entirely excused in the eye of the law?—Because her will is overruled and controlled by his, and he is, in law, the only guilty party. Why is the infant of tender years irresponsible for his acts? Because his mental powers are so weak and defective, that he has no criminal will or intent. Why is homicide, caused by pure accident, no crime? Because the voluntary will, the essence of all criminality, is wanting. For this reason it is, that if one commit a felony by means of a

innocent agent, the principal, and not the agent, is alone criminally responsible. *Regina v. Bleasdale*, 2 Carrington & Kirwan, 765.

It must be confessed, however, that this species of insanity, *moral insanity*, as it has been called, or *lesion of the will*, as medical men term it, (*lesion de volonté* of the continental writers) coexisting with *intellectual insanity*, has not received the sanction of modern English judges. Indeed, it has been emphatically repudiated, as our readers have already seen. And if by moral insanity is to be understood only a perversion or disordered state of the affections or moral powers of the mind, it cannot be too soon discarded as affording any shield from punishment for crime. It would be as just and as safe to make moral depravity a protection for crime, as to extend the defence of insanity to any such untenable and pernicious grounds.

But may there not be a *moral or homicidal insanity*, consisting of an irresistible inclination to kill, or commit some other offence, some unseen pressure on the mind, drawing it to consequences which it sees but cannot avoid, and placing it under a coercion, which, while its results are clearly perceived, it is incapable of resisting? Such was the opinion and language of Chief Justice Gibson, of Pennsylvania, in the case of *Commonwealth v. Mosler*, 4 Barr, 267, (1846.) It is not alone the same who may say, "I see the right and yet the wrong pursue." On what other ground was the servant maid, in *Regina v. Brixey*, ante, entitled to an acquittal? She had capacity to know, and did know, she was doing wrong. She knew the nature of the act she was doing, and its penalty. She was even curious to know which of the alternative penalties was to be visited upon her head. Tried by the test of knowledge alone, she was responsible.

Neither would the second test, before spoken of, exempt her; for there was no evidence she was laboring under any *delusion of fact*, which, if true, would have been a justification, as in *Commonwealth v. Rogers*. Unless, therefore, some other species of insanity, or manifestation of that disease, is recognized, what shall be done with her case, and other similar cases? On what other ground is the parent, who, without cause, suddenly murders an innocent and beloved child, sometimes held excusable? Accountability for crime pre-supposes a criminal intent, and that requires a will subject to control. For this reason, a homicide committed under the influence of *uncontrollable impulse*, has been declared to be no murder. But this must be confessed to be a *most dangerous doctrine*, and one to be recognized only in the clearest cases. To establish such a justification, said Chief Justice Gibson, in 4 Barr, 267, in any particular case, it is necessary to show, by clear proofs, its contemporaneous existence evinced by present circumstances, or the existence of an habitual tendency, developed in previous cases, becoming in itself a *second nature*.

How difficult must it be satisfactorily to determine whether an act charged as criminal was the result of a truly irresistible impulse, overruling a diseased and disordered mind, or was only the outbreak of ungoverned, and therefore ungovernable passions. Yet the one is a sufficient excuse, and the other no palliation for deeds of violence and wrong.

While, on the one hand, there is too much foundation for the remark of Mr. Baron Gurney, on trial of the case of *Rez v. Reynolds*, that the "defence of insanity had lately grown to a fearful height, and the security of the public requires that it should be closely watched," may not a portion of the distrust of eminent judges in that species of insanity exhibiting itself in an *irresistible impulse*, be founded rather in the extreme difficulty of satisfactorily determining whether, in any given case, the impulse under which the act was done, was or was not irresistible, than in the plea itself when entirely proved. That it is almost beyond the reach of man's wisdom to know whether a prisoner was or was not not able to control and

subdue the power which was urging him on to the commission of the crime, is unquestionably true; nevertheless, the difficulty of doing any fact sought for, in a judicial investigation, ought not to affect the consequence of that fact, *when once established*. Besides, the same objection apply, and with equal force, to the other test of *viz.* : capacity of knowing right from wrong? How much easier human imperfection to determine that a prisoner had not sufficient will to control his impulses? The difficulty is not in the *test*; it is inherent in the nature of the subject. What finite mind can fathom or fully comprehend the workings of a mind laboring under this serious and subtle disease? "It is hid from the eyes of all living close from the fowls of the air."

Although the doctrine of *irresistible impulse*, or moral insanity, is established among medical writers, and gentlemen experienced in the treatment of lunatics, it has not yet attained a fixed and decisive character in the law. It seems to have been recognized by Chief Justice Shaw in a leading case, when he says, "Monomania may operate as an excuse for a criminal act, when it indicates, to an experienced person, that the accused is in a diseased state; that the known tendency of that disease is to break out into sudden paroxysms of violence, venting itself in both other violent acts towards friend or foe indiscriminately; so that there were no previous indications of violence, yet the subsequent outbreak connecting itself with the previous symptoms and indications, will enable an experienced person to say that the outbreak was of such a character for the time being, *it must have overborne memory and reason*; that it was the result of the disease, and not of a mind capable of choice; *that it was the result of uncontrollable impulse*, and not of an act acted upon by motives, and governed by the will."

Judge EDMONDS, on the trial of *Klein* for murder, in New York, 1844, said to the jury:

"If some controlling disease was, in truth, the acting power which he could not resist, or if he had not sufficient use of his reason to control the passions which prompted him, he is not responsible. There must be an absolute dispossession of the free and natural agency of the mind. It must be borne in mind that the *moral* as well as the *intellectual* faculties may be so disordered by the disease, as to deprive the accused of the power of *controlling and directing power*. In order to establish crime, a man must have memory and intelligence to know that the act he is about to commit is wrong; to remember and understand, that if he commit the act he will be subject to punishment; and reason and *will* to enable him to choose between the supposed advantage or gratification to be derived from the criminal act, and the immunity from punishment which he may secure by abstaining from it. If, on the other hand, he have sufficient intelligence enough to have a criminal intent and purpose, and if his intellectual powers are either so deficient that he has not sufficient *conscience, or controlling mental power*; or if, through the over violence of mental disease, his intellectual power is for the time being so impaired, that he is not a responsible moral agent." (2 American Jurisprudence, January, 1846, p. 261.) Substantially the same principle was recognized by WHITING, J., on the trial of *Freeman*, 4 Denio, 201 (of Freeman, pamphlet.)

It may be that there is not yet a concurrence by the English law of the species of insanity last alluded to, but that may be in part due to that extreme regard for life and property ever indicated in the law and opinions of the English bench.

The conclusion to which we come on this branch of our subject

fore, that it is impossible to give a complete definition of insanity, or one that is universally applicable, or to say what it is, and what it is not; it may be described and explained, but not defined. We think, however, that the state of the authorities will justify these three propositions, as already established:

First. A person is not criminally responsible, if, at the time he committed the act, he had not sufficient capacity to know whether his act was right or wrong, or, more accurately, to know that it was contrary to the law of the land.

Thus far, all the authorities agree.

Second. He is not responsible, if the act was done under a fixed bona fide delusion, that certain facts existed, which were wholly imaginary, but which, if true, would have been a good defence. Fourth Answer of the judges in *McNaughten's case*, ante. *Commonwealth v. Rogers. Rex v. M'Gora*, 5 Carr. & Payne, 168. *People v. Pine*, 2 Barbour, 571. *Huntfield's case. Martin's case.*

Third. He is not responsible, if the act was done under some irresistible impulse, the result of a diseased and disordered mind, which overpowered his will, taking away his power of control, and there was no criminal intent. *Roberts v. The State*, 8 Kelly, 310. *Regina v. Touchett. Regina v. Brizey. Regina v. McNaughten. Regina v. Oxford. Klemm's case.*

II. Of the evidence admissible on the issue of insanity, and especially the opinions of witnesses therein:

It seems to be generally conceded that a higher degree of insanity must be shown in criminal cases, in order to absolve a party from guilt than in civil actions to discharge him from the obligations of his contract. 2 Greenleaf, Ev. § 372. But it is conceived that in both cases the same evidence is admissible, and that what may be received in one, may be received in the other, and what must be rejected in one, ought to be rejected in the other. See *Watson's case*, 2 Starkie, 155. *Murphy's case*, 1 C. & P. 297. And although the precise question always is, whether the accused was insane at the very time he committed the act, yet evidence of acts, declarations and conduct both before and after that time, showing an insane state of mind, are admissible as bearing upon the exact point in controversy. *Peaslee v. Robbins*, 3 Metcalf, 164, (1841.) *Norwood v. Marrow*, 4 Dev. & Batt. 442, (1839.) *Vance v. Commonwealth*, 2 Virginia cases, 132, (1818.) *Grant v. Thompson*, 4 Conn. 203, (1812.) *Dickinson v. Barber*, 9 Mass. 225, (1812.) *United States v. Sharp*, 1 Peters, C. C. 118, (1815.) *Bryant v. Jackson*, 6 Humphreys, 199, (1845.) *McAllister v. The State*, 17 Alabama, 434, (1850.) *McLean v. The State*, 16 Alabama, 672, (1849.) *Kinne v. Kinne*, 9 Conn. 102, (1831.) And where general insanity is proved to have existed prior to the commission of the crime, its continuance up to that time will be presumed, and the prosecution must then show the occurrence of a lucid interval. *Cartwright v. Cartwright*, 1 Phillimore, 100, (1793.) *Jackson v. Van Dusen*, 5 Johnson, 144. *Armstrong v. Tinnons*, 3 Harrington, 342. *Jackson v. King*, 4 Cowen, 207, (1825.) *State v. Spencer*, 1 Zabriskie, 196, (1846.) *Hoge v. Fisher*, 1 Peters, C. C. 163, (1818.) So of partial insanity, or insanity only on particular subjects, — *Thornton v. Appleton*, 29 Maine, 298 — unless such prior insanity was caused by some violent disease, in which case the presumption of continuance does not apply; for *cessante ratione, cessat ipsa lex*. *Hix v. Whitmore*, 4 Metcalf, 545, (1842.) For to authorize the presumption of continuance, the insanity proved ought to be of an habitual and not merely an occasional character. *Lewis v. Baird*, 3 McLean, 56, (1842.) The rules of evidence, therefore, being the same in civil and criminal cases, evidence of hereditary insanity is admissible in

both cases. *Regina v. Tuckett*, 1 Cox, C. C. 103, (1844.) *Regina v. Oxford*, 9 Car. & Payne, 525, (1840.) But medical books containing the opinions of medical gentlemen of even the highest authority are not, on the recent authorities, admissible in either case. *Commonwealth v. Wilson*, 1 Gray, 337, (1854.) *Collier v. Simpson*, 5 Carrington & Payne, 74, (1831.) *Cocks v. Purday*, 2 Carr. & Kirwan, 270, (1846.) *Carter v. The State*, 2 Carter, 617, (1851.) And the spirit of the rule forbids the reading of such books to the jury. *Regina v. Cranch*, 1 Cox, C. C. 94, (1844.) But that may be rather a matter of discretion with the court. *Luning v. The State*, 1 Chandler, 178, (1849.)

And this brings us to the main question on this branch of our subject, viz.: *When are the opinions of physicians and others competent evidence on the issue of insanity?*

That professional gentlemen, who are acquainted with the disease of insanity, and who have personally examined the party to whom insanity is attributed, may give their opinion upon the direct question whether he was or was not insane, is beyond controversy. Such evidence comes strictly within a familiar principle of law, permitting the opinions of experts to go directly to the jury. But our leading case goes much farther than this, and permits persons conversant with insanity, and who have heard the testimony adduced at the trial, but who have never had any personal knowledge of the party, to give their opinion upon the sanity or insanity of the prisoner, supposing the facts detailed at the trial to be true. The grounds of the admissibility of such evidence are exceedingly well stated in the lucid charge of Chief Justice SHAW, in our leading case, and the propriety of the rule has been frequently recognized and acted upon in other American courts. *McAllister v. The State*, 17 Alabama, 434, (1850.) *Clark v. The State*, 12 Ohio, 483, (1843.) *Potts v. Howe*, 6 Georgia, 324, (1849.) And such a question has frequently been permitted in England, sometimes with and sometimes without objection. See *Rex v. Searle*, 1 Moody & Robinson, 75, (1831.) PARK, J. *Rex v. Offord*, 5 Carrington & Payne, 168, (1831.) *McNaughten's case*, 10 Clark & Finnelly, 201, (1843.)

And MAULE, J., in answer to the questions by the House of Lords, acquiesced in the propriety of such questions, and considered the position established. But all the other judges declared a contrary opinion. The question put to them was: "Can a medical man, conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial and the examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious, at the time of doing the act, that he was acting contrary to law, or whether he was laboring under any and what delusion at the time." And their reply was in these words: "We think the medical man, under the circumstances supposed, cannot in strictness be asked his opinion in the terms above stated, because each of those questions involves the determination of the truth of the facts deposed to, which it is for the jury to decide, and questions are not mere questions upon a matter of science, in which case such evidence is admissible. But, where the facts are admitted, or not disputed, and the question becomes substantially one of science only, it may be convenient to allow the questions to be put in that general form, though the same cannot be insisted on as a matter of right."

If, therefore, the question could not be put as a matter of right, it could not be put at all, if objected to by the opposite party, which is equivalent to disallowing it altogether. And Lord Brougham, in the debate on this

case in the House of Lords, declared, that "if the House would look at what was laid down by Lord Hardwicke, then sitting as Lord High Steward at the trial of Earl Ferrers, in 1760, when that very kind of evidence was tendered, where those very questions were put to the witnesses, and when Lord Camden, then Attorney General Pratt, objected to that evidence and those questions, they would find that Lord Hardwicke said that the question must not be put—that it was not legal evidence; and his Lordship said, you must not ask a witness whether the facts sworn to by other witnesses preceding them amount to a proof of insanity, you shall state the facts to the witnesses—men of skill in their profession—and you shall ask if such a fact is an indication of insanity or not—you shall ask them, upon their experience, what is an indication of insanity—you shall draw from them what amount of symptoms constitute insanity—but you shall not remove the witness from the witness-box into the jury-box, be he a medical man of the most unquestionable skill, the most practiced in that most useful but most painful walk of his vocation; be he the most competent possible to give us the result of his practical observation, and experience, still you shall not transfer that witness from the witness-box to the jury-box, but you shall ask him what symptoms his experience indicates to him as a test of insanity or sanity, and leave it to the judge, or rather to the jury, to say, whether the man be guilty or not guilty, he being sane or insane."

This is in direct conflict with the rule as adopted in *Commonwealth v. Rogers*, but it is the modern English practice. See *Rex v. Wright, Russell & Ryan*, 451, (1831.) *Regina v. Frances*, 4 Cox, C. C., 57, (1849.) In this case, the question was put by the prosecution, in these words, to a physician who had been in court during the whole case: "Whether, from all the evidence he had heard both for the prosecution and the defence, he was of opinion that the prisoner, at the time he did the act in question, was of unsound mind?" Alderson, B., immediately interposed, saying: "I cannot allow such a question to be put." McNaughten's case, and the opinion as given above, was then cited. CRESSWELL, J. then added: "That case decides that the question cannot be put as a matter of right," and Alderson said: "And I do not think that it ought to be put at all. I am quite sure that decision was wrong. The proper mode is, to ask what are the symptoms of insanity, or to take particular facts, and assuming them to be true, to ask whether they indicate insanity on the part of the prisoner. To take the course suggested is really to substitute the witness for the jury, and allow him to decide upon the whole case. The jury have the facts before them, and they alone must interpret them by the general opinions of scientific men." Cresswell, J. concurred. The following year the same question arose before Lord Campbell, on an issue to try the mental competency of a testator to make a will. The question was in a similar form as that in *Regina v. Frances*. Lord Campbell said, "I have not the slightest hesitation in overruling it. The witness may give general scientific evidence on the causes and symptoms of insanity, but he must not express an opinion as to the result of the evidence he had heard with reference to the sanity or insanity of the testator"—his Lordship saying peremptorily that he would not allow a physician to be substituted for a jury. *Doe d. Bainbrigge v. Bainbrigge*, 4 Cox, C. C. 454, (1850.)

In the same year, on the trial of Robert Pate, before Baron Alderson, for an assault upon the Queen, a medical gentleman was about to testify, "From all I have heard to-day, and from my personal observation, I am satisfied the prisoner is of unsound mind." The presiding judge with some indignation interposed, "Be so good, Dr.—— as not to take upon yourself the functions of both the judge and jury. If you can give

as the results of your scientific knowledge in this point, we shall be glad to hear you ; but while I am sitting on this bench, *I will not permit any medical witness to usurp the functions of both the judge and the jury.*" But *how* usurp the functions of the jury ? True it is, the jury are to give their opinion upon the direct question, "whether the prisoner was or was not insane." And true it is that such is the identical question sought to be put in these cases to medical gentlemen. But how is that trenching upon the rights and powers of the jury ? In every investigation where matters of science, trade, &c., are involved, would not the same objection lie ? For instance, an experienced physician and surgeon sits at the trial of a person, for murder, by poison, or perhaps by violence ; he hears the witnesses describe the wound, its locality, length, depth and breadth, the symptoms of the sufferer, and the gradual wane of life, and the approach of death ; may he not then be asked whether, in his opinion, as a gentleman conversant with similar cases, such death was caused by the wound inflicted, or the poison administered ? And yet that is the very question which the jury must determine for themselves, in forming their general verdict of guilty or not guilty. Shall it be said that, for that reason, they shall not have the benefit of the opinion of persons more competent ? Is that the English practice in other cases where some other issue than insanity is raised ? Take the frequent case of actions involving the issue of careful or negligent management of a vessel. The question for the jury in such cases is, was the master guilty of negligence, that is, what is their opinion about it ? and yet it is every day's practice at such trials in England, to call nautical men, who have heard the evidence, but who knew nothing of the facts of the particular case, and ask them, supposing the facts to be true as testified, was the master guilty of negligence ? See an instance in *Malton v. Nesbit*, 1 Carrington & Payne, 70, (1824,) before Lord Tenterden. Is that usurping the province of the jury ?

It seems to us that such is the very best evidence that could be laid before a jury. The object of such a question is not to decide the fact itself, but to give the jury additional means for deciding it for themselves, viz.: the opinion of disinterested persons, who on account of their professional knowledge, are more competent to judge than persons in the ordinary walks of life. See also *Fenwick v. Bell*, 1 Carrington & Kirwan, 312, (1844,) which was for collision of two vessels, whereby the plaintiff was injured. A witness, who had heard the trial, was asked whether, supposing the facts as proved by the plaintiff to be true, the collision *could have been avoided by proper care on the part of the defendants* ? Now that was the precise question the jury were to try, and in that case the very objection was taken, but it was overruled and the question put.

Lord Ellenborough has also sanctioned the same kind of evidence in *Beckwith v. Sydebotham*, 1 Campbell, 116, (1807,) where the issue was whether a vessel insured by the defendant was seaworthy. The defendant called eminent surveyors of ships, *who had never seen the vessel lost*, to prove that on the facts testified by others, she could not have been seaworthy at the commencement of the voyage. The same objection was raised again, that this was an inference which the jury, and the jury alone, were to draw. But Lord Ellenborough held that this was like examining a physician or surgeon, to say whether, upon such and such symptoms, a person whose life was insured, could, at the time of insurance, have been in a good state of health — "where there was a matter of skill or science to be decided, the jury might be assisted by the opinion of those peculiarly acquainted with it from their professions or pursuits." See also *Thornhill v. Royal Exchange Assurance Co.*, Peake, 25.

We have confined ourselves, in the citation of these analogies, to English decisions, because it is only in that country that the mode of putting

the question practiced in *Commonwealth v. Rogers*, is disapproved. The distinction between asking a physician whether, in his opinion, a certain individual *was or was not* insane? and asking him whether the acts which that person committed, in his opinion, *indicate* sanity or insanity? is certainly perceptible, but, as we think, it is a distinction without a difference. The latter is a *general* question of science and experience, as to the usual and ordinary evidences or criteria of insanity, and the former is but an application of the same general principle of science and experience, to the manifestations of a particular case. Possibly it may not be competent to ask a witness his opinion whether the act charged was *caused* by the insanity of the prisoner, since that would be excluding all other agencies, (*Wright's case*, 1 Russ. & Ryan, 456,) but that is a very different question from asking his opinion of the person's sanity or insanity. The rule of our leading case, therefore, seems best supported by principle and analogy.

The opinions, therefore, of physicians being competent testimony, and they being permitted to give their opinion upon the direct question, whether the accused was, or was not insane, can they also be asked whether, in their opinion, the prisoner was capable of distinguishing between right and wrong? Such a question was disallowed and disapproved by Baron Rolfe, in *Regina v. Layton*, 4 Cox, C. C. 155, he saying it was a question which no man could be prepared to answer. On the other hand, the question was put and allowed in America, on cross-examination, to a physician who had testified in chief that he believed the party was insane. See *Clark v. The State*, 12 Ohio, 483, (1843.)

Physicians, however, are not permitted to give their *mere* opinion of a person's sanity; they must also give the facts and circumstances on which their opinion is founded, otherwise the opinion will be entitled to very little weight — *Clark v. The State*, 12 Ohio, 483, (1843;) *Hathorne v. King*, 8 Mass. 371, (1811,) — and has sometimes been excluded *altogether*. *Dickinson v. Barber*, 9 Mass. 225, (1812.)

Opinions of witnesses not professional. That witnesses, *not professional*, cannot give their opinion from facts disclosed at the trial, and cannot give their opinion at all upon the question of insanity, unconnected with facts and circumstances upon which such opinion is founded, is entirely clear. It may be that witnesses to a will form an exception to this rule, and it is not unusual, upon an issue to try the sanity of a testator, to ask such persons the abstract question alone, whether, in their opinion, the testator was, at the time of execution of the will, of sound mind. But this exception does not impair the rule itself, which is sustained by reason and authority. *Gibson v. Gibson*, 9 Yerger, 329, (1836.) *Potts v. House*, 3 Georgia, 325, (1849.) *Dicken v. Johnson*, 7 Georgia, 484, (1849.) *The State v. Brinyea*, 5 Alabama, 241, (1843.) *Doe d. Sutton v. Reagan*, 5 Blackford, 217, (1839.) *McCurry v. Hooper*, 12 Alabama, 823, (1848.)

But on the broader question, whether witnesses, *not professional*, but who have, for a long time, personally known the individual charged with insanity, and have had opportunities of observing him, his habits, manners and conduct, can give their opinion of his insanity, there is more room for doubt and difference of opinion. This evidence was admitted, after much deliberation, in *Clary v. Clary*, 2 Iredell, 78, (1841,) on an issue to try the sanity of a testator, and the reasons for its admission were ably stated by GASTON, J. If admissible in such case, we can see no reason why it should not be whenever the question of sanity or insanity is in issue. The American authorities generally favor the admission of such evidence, requiring, however, that the witness should first state the facts and circumstances

on which his opinion is founded. *Clark v. The State*, 19 Ohio, 483, (1843.) *Grant v. Thompson*, 4 Connecticut, 203, (1822.) *Rambler v. Tryon*, 7 Sergeant & Rawle, 90, (1821.) *Wogan v. Small*, 11 Sergeant & Rawle, 141, (1821.) *Morse v. Crawford*, 17 Vermont, 499. *Lester v. Pittsford*, 7 Vermont, 158. *Gibson v. Gibson*, 9 Yerger, 329, (1836). *Potts v. House*, 6 Georgia, 324, (1849). *Calver v. Haslam*, 7 Barbour, 374, (1849,) where the subject is examined at length. *Baldwin v. The State*, 12 Missouri, 223, (1848.) *De Witt v. Barley*, 13 Barbour, 550, (1852.) *Kinne v. Kinne*, 9 Conn. 102. *Norris v. The State*, 16 Alabama, 776, (1849.) It is also admitted in the English ecclesiastical courts. *Wheeler v. Wheeler*, 3 Haggs. 574.

But with deference to the decisions of so many very respectable tribunals, it is not easy to see the grounds upon which such testimony is competent. That ordinary witnesses cannot give their *mere* opinion, unsupported by facts and circumstances, *all agree*. Why then, should the fact that such witnesses have stated facts which may tend to satisfy the jury of the insanity, enable the witness to give his opinion, when he otherwise could not, or make that competent evidence which before was not so? The disclosure of the facts and circumstances on which the opinion was based, might, *if the opinion were admissible at all*, add much to its weight and strength; it might affect materially its *credibility*; but that is a very different question from its *competency*; the one is solely for the jury, the other solely for the court. In some courts, such evidence is not admitted, and persons, not experts, nor subscribing witnesses to a will, are not permitted to state their opinion as to a person's sanity, although they first state the facts and circumstances on which it is founded. *Commonwealth v. Wilson*, 1 Gray, (Mass.) 337, (1854.) *Poole v. Richardson*, 3 Mass. 330, (1807.) *Needham v. Ide*, 5 Pick. 510.

III. *What degree of proof is sufficient to authorize the finding of a verdict of insanity?*

That every man is presumed to be sane until the contrary appears, has become an axiom of the law; and therefore that it is incumbent on the prisoner to establish the fact of insanity, whenever he relies upon such a defence, has been again and again declared. *Attorney General v. Parnter*, 3 Brown, C. C. 441, (1792.) *Lee v. Lee*, 4 McCord, 183, (1837.) *Jackson v. King*, 4 Cowen, 207. *Hoge v. Fisher*, 1 Peters, C. C. 163, (1818.) *Jackson v. Van Dusen*, 5 Johnson, 141. *State v. Stark*, 1 Strobhart, 479, (1847.) *Regina v. Layton*, 4 Cox, C. C. 149, (1849.) *Regina v. Stokes*, 3 Carr. & Kirwan, 188, (1848.)

Whether, in a criminal case, this rule is always true in its whole length and breadth, may be discussed in a future note on the "Burden of Proof," but the authorities as yet recognise no distinction between civil and criminal cases, in this respect. For the present, therefore, we assume as true, the language of Rolfe, Baron, in *Regina v. Taylor*, 4 Cox, C. C. 155, that "In cases of insanity, there is one cardinal rule *never to be departed from*, viz.: that the burden of proving innocence rests on the party accused. Every man committing an outrage on the person or property of another must be, in the first instance, taken to be a responsible being. Such a presumption is necessary for the security of mankind. A man going about the world, dealing and acting as if he were sane, must be presumed to be sane, till he proves the contrary." See also *Regina v. Stokes*, 3 Carrington & Kirwan, 188, (1848.) The question therefore is, said that acute minded judge, not "whether the prisoner is of sound mind, but whether he has made out to the satisfaction of the jury that he was of unsound mind." (For, of course, if the prisoner must prove his insanity, he must prove it *to the satisfaction of a jury*. But what *degrees* of satisfaction must he produce in their minds to entitle him to an

acquittal? Does the same burden devolve upon him, as upon the government to prove the *corpus delicti*? Must he satisfy the jury beyond a reasonable doubt, or by a fair balance of testimony? The same rule has been sometimes applied to the prisoner as to the government. Thus, in *The State v. Brinyea*, 5 Alabama, 244, (1843,) the judge at *nisi prius* ruled that "it was incumbent upon the State to make out the prisoner's guilt beyond all reasonable doubt, but if the act was proved, then the prisoner was bound to make out by the testimony, *beyond all reasonable doubt*, that he was insane at the time the act was committed, by proof strong, clear, and convincing. But if, upon the testimony, the jury entertained no reasonable doubt of the defendant's sanity, they should find him guilty." And this ruling was affirmed on error. The same rule is said to have been adopted in *The State v. Masler*, 2 Alabama, 43, (1841.)

ROLFE, B., in *Regina v. Stokes*, 3 Carrington & Kirwan, 188, (1845,) says: "If the prisoner seeks to excuse himself upon the plea of insanity, it is for him to *make it clear* that he was insane at the time of committing the offence charged. The *onus* rests on him, and the jury must be satisfied that he was actually insane. *If the matter be left in doubt*, it will be their duty to convict." The same was said in *The State v. Stark*, 1 Strobbart, 479, (1847.)

Chief Justice HORNBLOWER, in *The State v. Spencer*, 1 Zabriskie, 202, (1846,) said with some emphasis: — "Where it is admitted, or clearly proved, that the prisoner committed the act, but it is insisted that he was insane, and the evidence leaves the question of insanity in doubt, the jury ought to find against him. *The proof of insanity at the time of committing the act, ought to be as clear and satisfactory, in order to acquit a prisoner on the ground of insanity, as proof of committing the act ought to be, in order to find a sane man guilty.*"

But a milder and more merciful rule was adopted in our leading case, viz.: That if the prisoner satisfied the jury by a *preponderance* of the evidence that he was insane, the defence was made out.

And is not this the true rule in all cases? It being a universally admitted principle, that in all causes between *party* and *party*, the proof of any fact by the preponderance of testimony is all that is requisite, is not the only exception to this rule, the case where the government is one party, and the individual the other? And is not this exception, requiring proof beyond a reasonable doubt of the prosecution, an exception *in favorem vitæ*; the natural result of the legal presumption of innocence, always allowed, and should it not be limited and applied only to the precise case on which it is founded? Is not the analogy of the criminal law in favor of the less stringent rule? For instance, when the defence for homicide is that gross provocation existed, reducing the crime from murder to manslaughter, is the defendant bound to prove the provocation beyond a reasonable doubt, or only by a preponderance of testimony? The latter was the opinion of the court in *Commonwealth v. York*, 9 Metcalf, 94, (1845.)

So, where the defence is an *alibi*, must the defendant make out, beyond all doubt, that he was elsewhere at the time of the commission of the crime? And if the jury fairly and truly doubt whether he was the person who gave the fatal blow, is he not clearly entitled to an acquittal?

And in prosecutions for violations of some statutory laws, as game laws, or license laws, if the defence rests on the fact that the defendant was a qualified or licensed person, is not that fact made out by a *preponderance* of the testimony? See *Smyth v. Jefferies*, 9 Price, 257, (1821.)

In like manner, when the defence to an assault and battery is, that the blow was accidental, if the proof of that fact is ever upon the defendant,

is not the defence established by a fair balance of the testimony on his side?

And if infancy or coverture be the defence, does not the same rule apply? Why should a different rule obtain when the defence is insanity?

E. H. B.

Supreme Judicial Court, Suffolk, ss., March Term, 1855.

JOHN A. HANSON, PETITIONER IN EQUITY, *vs.* JAMES W.

PAIGE ET AL., ASSIGNEES OF J. W. BLODGETT & Co.

Insolvent Law — Assignment — Partnership.

In a petition by a partnership for the benefit of the insolvent law, there must be a substantial averment that the partners, in their individual capacity were insolvent, but no precise formula of words is required to state that fact. When a petition stated that they (the members of a partnership) were merchants and partners, and "that they are indebted, in divers sums of money, &c., which they are unable to pay in full," it was held that the word "they" was not to be restricted in its reference to the firm, but referred also to the partners individually.

It is sufficient if the warrant follow the petition, and it therefore need not require the messenger to take possession of the separate estate of the partners. And if he fails to do so, all the property of the partnership, and of the partners, passing to the assignees by the commissioner's assignment, they have full authority to take and dispose of it in the execution of their trust.

If the names of any persons who are not partners are included in the petition, the proceedings may be stayed as to them, but their validity as to the actual partners will not be affected.

THIS cause was argued at the present March term of the Supreme Court, by *J. W. Hubbard*, for the petitioner; *A. H. Fiske*, for the assignees of *J. W. Blodgett & Co.*; and *B. F. Brooks*, for *J. W. Blodgett and W. Gore, Jr.*

The facts are stated in the opinion of the Court, which was delivered by

THOMAS, J. The petition of Hanson sets forth in substance that he is a creditor of John W. Blodgett and Watson Gore, Jr., partners under the firm of *J. W. Blodgett & Co.*, holding their promissory note, over due, for \$1260; that for the purpose of collecting the note, on the twenty-second of February last, he sued out of the Clerk's office of the Common Pleas, a writ against *J. W. Blodgett and Watson Gore, Jr.*, and caused personal property of the firm of *Blodgett & Co.* to be attached; and that *James W. Paige* and others, claiming to be assignees in insolvency of the said *Blodgett & Co.*, replevied the property so attached, and have given

notice to the petitioner that the property attached belongs to them as such assignees, and that they commenced the suit of replevin in discharge of their trust.

The petition further shows, that on the 11th of December last, John W. Blodgett signed and presented to Charles Demond, Esq., Commissioner of Insolvency for the county of Suffolk, an application for the benefit of the insolvent laws. The petition is as follows :

To CHARLES DEMOND, Esquire, Commissioner of Insolvency, within and for the county of Suffolk, and Commonwealth of Massachusetts.

Humbly shows, John W. Blodgett, in behalf of himself and S. S. Stone, J. C. Bundy, W. Gore, Jr., A. Goodnow, and T. S. Mandell, all of Boston, merchants and co-partners, under the firm of John W. Blodgett & Co.

That they are indebted in divers sums of money, amounting, in the whole, to not less than two hundred dollars, which they are unable to pay in full; and they wish to surrender all their property, for the benefit of their creditors, and obtain their discharge from their said debts, according to the statutes in this behalf provided.

Wherefore he prays that a warrant may be issued for taking possession of their estate, and that such further proceedings may be had in the premises, as the law in such cases prescribes.

J. W. BLODGETT.

That on the same 11th of December, the said commissioner issued his warrant to the sheriff or his deputies, to take possession of the estate of Blodgett & Co., and directing him to give notice that a meeting of the creditors would be held on the 23d of December.

The warrant and return of the officer thereon, were as follows :

(WARRANT.)

COMMONWEALTH OF MASSACHUSETTS.

Suffolk, ss.

IN INSOLVENCY.

Before CHARLES DEMOND, Esq., Commissioner of Insolvency, in and for the said county of Suffolk. In the matter of John W. Blodgett, S. S. Stone, John C. Bundy, W. Gore, J. A. Goodnow and T. S. Mandell, all of Boston, merchants and co-partners, under the firm of John W. Blodgett & Co., insolvent debtors.

To the Sheriff of the said county of Suffolk, or either of his Deputies.

You are hereby required, as Messenger, to take possession of all the estate, real and personal, of the said insolvent debtors, excepting such as is, by law, exempted from attachment, and of all their deeds, books of account, and papers; and keep the same safely, until the appointment of an assignee or assignees.

And you are also required to give public notice by advertisements, to be published twice inside, in the newspapers called the *Boston Daily Journal*, and *Daily Advertiser*, printed at Boston, the first publication to be made forthwith :

1. That this warrant has issued.
2. That the payment of any debts and the delivery of any property belonging to the said insolvent debtors, to them, or for their use, and the transfer of any property by them, are forbidden by law.
3. That a meeting of the creditors of the said insolvent debtors will be held at a Court of Insolvency, at the Commissioner's Room, in the Court House, in Boston, on the twenty-third day of December current, at nine o'clock in the forenoon, for the proof of debts, and the choice of an assignee or assignees.

You will also send written notice, within five days after the date hereof, to the creditors of the said insolvent debtors, named on their schedule of creditors to be delivered to you by them, within three days after the date hereof, of the time and place of the said meeting. And you will there have this warrant, with your doings thereon.

Witness my hand and seal, this eleventh day of December, in the year one thousand eight hundred and fifty-four.

CHARLES DEMOND,
Commissioner of Insolvency.

(OFFICER'S RETURN.)

Suffolk, ss.

DECEMBER 23, 1854.

By virtue of this warrant, I have taken possession of all the property of the within-named John W. Blodgett & Co., that has come to my knowledge. I have also published the notification prescribed in this warrant, twice inside, in each of the newspapers within mentioned ; I further certify that I have sent written notices to each of the creditors named in the schedule returned with this warrant, within five days from the date of said warrant, which schedule was received by me within three days from the date of this warrant. The first publication aforesaid was made on the 11th day of December instant.

BENJAMIN F. BAYLEY,
Deputy Sheriff.

That a meeting of creditors was held, claims proved, and James W. Paige and others chosen assignees, and that on the same day the commissioner executed an assignment to them, of the construction of which no question is made.

That a second meeting of creditors was called, to be holden on the 2d of March, and that said assignees have proceeded with the execution of their trust.

The petitioner then states that four of the persons named in the petition of Blodgett, were not partners: Bundy, Stone, Goodnow and Mandell.

The petitioner then avers that the proceedings in insolvency are null and void :

1st. Because it is not alleged, and does not appear in the petition to the commissioner, that the partners individually were insolvent.

2d. Because the warrant did not require the messenger to take possession of the separate estate of the partners.

3d. Because the messenger did not take possession of the separate estate of the partners.

4th. Because Bundy, Stone, and Goodnow were not partners, and ought not to have been included in the petition.

The prayer is, that the insolvent proceedings be declared null and void, the proceedings stayed, and the assignees enjoined and restrained from the further prosecution of their suit in replevin.

To the petition appropriate answers were filed by the assignees and Blodgett and Gore.

Under the provisions of the fifth section of the statute of 1838, chapter 163, in all suits prosecuted by the assignees for any debt belonging to the insolvent debtor, the assignment made to them by the judge or commissioner is made conclusive evidence of their authority to sue as such assignees. This is so, although the prior proceedings may have been defective or erroneous, the remedy of the party aggrieved being by application to the court sitting in equity, and under the provisions of the same chapter, § 18, to arrest the proceedings if they have been irregular, to order an injunction on the assignees in the prosecution of suits at law or other proceedings and to supersede and set aside the assignment. *Partridge v. Hannum*, 2 Met. 569; *Wheelock v. Hastings*, 4 Met. 504; *Grant v. Lyman*, 4 Met. 470.

The petitioner is rightfully before this court, sitting in equity.

The question is, whether the proceedings are defective, and, for that cause, null and void.

Of the four objections made to the validity of the proceedings, the first only has presented any difficulty — that is, that it was not alleged in the petition that the partners, in their individual capacity, were insolvent.

A preliminary question was made, whether that allegation is necessary. We cannot doubt that there must be a substantial averment of this fact; for if one of the partners were solvent, such solvent partner would have the legal right of settling the affairs of the partnership, and the com-

missioner would have no power to take by his warrant the partnership property out of his hands.

Again, as such partner is liable *in solido* for the debts of the concern, a partnership cannot with strictness be said to be insolvent, while any of the partners are able to pay its debts. But no precise formula of words is required in which to state this fact; though technical accuracy is very desirable in these matters, it is not absolutely essential.

The petitioner, in behalf of himself, and Stone, Bundy, Gore, Goodnow, and Mandell, whom he states are merchants of Boston, and copartners, under the firm of John W. Blodgett & Company, sets forth that they are indebted in divers sums of money, amounting in the whole to not less than two hundred dollars, which *they* are unable to pay in full. The suggestion is, that the word *they* is to be referred to the company only, and that the allegation, therefore, only is, that the *firm* is insolvent. If this were so, for the reason before stated, that each partner is liable for the entire debts, an allegation of the insolvency of the firm would seem to include the insolvency of all its members. But the word *they* is not to be thus restricted. No rule of construction requires or warrants such interpretation. The averment is not that the persons named are in the relation as partners indebted. The allegation is more general and comprehensive: — "*they* are indebted in divers sums of money, which *they* are unable to pay in full;" that is, that they, in their individual or collective capacity, in all the capacities they have, are unable to pay in full. *They* are indebted in divers sums of money, which *they* are unable from any source to pay. So the averment that *they* wish to surrender all *their* property, extends to all their property, held in any capacity, which is applicable to such payment. "For the benefit of their creditors" means for the benefit of the creditors of all of them, and of each and every one of them.

The warrant follows the petition, and is sufficient.

If the service of the warrant was defective, by reason of a failure to take possession of the individual property of the partners, that defect is easily cured. The commissioner's deed has conveyed all the property of the insolvents, partnership and private, to the assignees, and they have full authority to take it and dispose of it in the execution of their trust.

If the petition, warrant, and assignment included per-

sons who were not partners, the proceedings may be stayed as to them, without affecting their validity as to those conceded to be partners.

The case of *Parker v. Phillips*, 2 Cush. 175, cited by the petitioner, is wholly unlike the case at bar. That was a petition by one partner, after the dissolution of the firm. The allegation of the partner petitioning, was, that he, individually, and as such partner, was indebted in divers sums of money which he was unable to pay in full. There was no allegation that the firm was insolvent, or that the other partner was insolvent. One partner, of course, may be insolvent, though the firm is solvent; though the converse of the proposition be not true.

The case of *Dearborn v. Keith*, 5 Cush. 224, was a petition presented, not only after the dissolution of the partnership, but after another petition had been filed, and proceedings instituted under it, by which the individual property of the petitioner, and the partnership property in his hands had been taken. The fatal defect in the petition was, that it asked to surrender only the property of the firm for the benefit of the creditors. It neither alleged in terms that the other partner was insolvent, nor asked to have his property taken. The proceedings under this his second petition were superseded on two grounds: the defect in the petition, and the conflict and confusion of rights which would necessarily result, if both processes were suffered to go on at the same time.

Petition dismissed.

Recent English Decisions.

Rolls Court, Saturday, July 8, 1854.

CALLEY v. RICHARDS.

Practice—Privileged Communications—Solicitor or Agent.

Communications between the plaintiff and a person, formerly a solicitor, and whom the plaintiff believed to be so still, seeking and giving professional advice, come within the rule as to privilege.

IN this case the question whether certain letters were or were not privileged communications, was brought before the consideration of the court by adjournment from chambers.

The defendant having obtained the usual order for the production of documents in the plaintiff's possession, the plaintiff claimed privilege for certain communications by letter between him and Mr. Mullings under these circumstances. The plaintiff wrote to Mr. Mullings, who had, for many years, practised as a solicitor at Cirencester, and more recently, in partnership with another gentleman, and had been the solicitor of the plaintiff, as his professional adviser, for his advice and assistance with respect to the matters which subsequently became at issue in this suit, and Mr. Mullings wrote four letters in reply to such communications. It appeared that Mr. Mullings had previously retired from practice (but by an arrangement with his partner, his name continued in the firm;) these circumstances were, however, unknown to the plaintiff at the time. The communications in question had reference to the competency of a person then living to make a will (one of the questions in this suit,) and the plaintiff's affidavit stated that the letters to Mr. Mullings were written in contemplation of the present litigation.

Lloyd and J. V. Pryor, for the defendant, in support of the application for production of the letters. Mr. Mullings is neither the solicitor of the plaintiff, nor an agent employed as the medium of communication with his solicitor, and the letters are, therefore, not entitled to privilege. *Fountain v. Young*, 6 Esp. 113; *Wilson v. Rastall*, 4 T. R. 753; *Greenham v. King*, 1 Beav. 137; *Bunbury v. Bunbury*, 2 Beav. 173; *Steele v. Stewart*, 1 Ph. 471; *Carpmael v. Powis*, lb. 753. The correspondence cannot be treated as being in contemplation of the suit within the rule, as laid down in the cases *Holmes v. Baddeley*, 1 Phil. 476; *Hawkins v. Gathercole*, 1 Sim. N. S. 154; *Walsingham v. Goodrick*, 3 Ha. 122.

Palmer, Q. C., and *Cairns*, for the plaintiff, were not called on.

THE MASTER OF THE ROLLS. — I am of opinion that these letters are privileged. It is objected that Mr. Mullings was not a solicitor at the time when they were written. The communications from the plaintiff to Mr. Mullings were made to him as his professional adviser, and Mr. Mullings replies to these letters, not disclosing the fact of his retirement. Mr. Mullings's name remained in the firm of which he had been a member, and the plaintiff swears that he did not know that Mullings had ceased to be a solicitor. Is

then the privilege of the plaintiff to communicate with his solicitor in the fullest manner, and which the plaintiff supposed he was exercising, to be destroyed under these circumstances? I am of opinion that it is not. If I am wrong in my decision, I think the consequences would be serious. A client might employ a solicitor, who, during the progress of the cause, might omit to take out his certificate, and the privilege would be destroyed although the client would know nothing about the omission. I think the result would be to defeat the operation of the rule, the object of which is that the plaintiff may communicate in the most unreserved manner with his professional adviser. The case is very different where, as in *Wilson v. Rastall*, the party consults a person who had stated that he could not act as his attorney, and the communication there would not come within the reason of the rule. *Fountain v. Young* is certainly a strong case; but if the report of that case be correct, the rule there laid down, limiting the privilege to communications directly between the client and the solicitor, is not now the rule of this court, for, by the latter cases, the rule has been carried out to its proper limits; and communications made through an agent are as much privileged as if made direct by the client, although the employment of an agent was not necessary. I think, therefore, that this objection to these communications being privileged fails. It is, however, also argued that these communications did not take place in contemplation of litigation. But, although at the time no litigation could be commenced, yet there were good reasons for supposing that litigation would ensue, and, therefore, there were good grounds for obtaining legal advice in anticipation of such an event. There is an affidavit to that effect in this case, and I think that *Herring v. Clesbury*, 1 Phil. 19, and *Holmes v. Baddeley*, apply, and that these communications are protected.

Court of Common Bench, Saturday, Nov. 4, 1854.

GRIFFITHS v. TEETGEN.

Seduction — Relation of Master and Servant — Temporary Service.

The plaintiff's daughter, living at home with her father, but having formerly been in the service of the defendant, was invited by his wife to return to defendant's house and take care of their shop whilst she was away, and was promised a gratuity for so doing. She complied,

and was seduced by the defendant whilst staying there. On the return of defendant's wife, plaintiff's daughter was sent away, and a gratuity of 8s. made for her services. Eventually she returned home, and was afterwards turned out of doors by her father.

Held, that the above facts disclosed sufficiently the relation of master and servant between the plaintiff and his daughter to enable him to maintain an action for seduction.

THIS cause was tried before the Lord Chief Justice at the sittings after term, in London, and a verdict found for the plaintiff, damages £25, with leave reserved to enter a verdict for the defendant, if the court above should be of opinion that the facts were insufficient to support an action.

Prentice now moved accordingly. — It was an action brought by the plaintiff against the defendant for the seduction of his daughter and servant; to which the defendant pleaded, first, not guilty; secondly, that the daughter was not plaintiff's servant as alleged. The question is whether, under the circumstances, the daughter was the servant of the plaintiff so far as to enable him to maintain an action for the loss of her services. The evidence of the daughter showed that she had formerly been in the service of the defendant, but had returned home. Early in April, 1853, the plaintiff's wife having written to her, requesting her to come and take care of the house and shop whilst she went from home, the young woman did so with her parents' consent. A gratuity was promised her. That was on the 11th April, 1853. On the second night after she went, the plaintiff entered her bed and debauched her. She stayed at the plaintiff's till the 11th of May, when Mrs. Teetgen returned, and on leaving the house, the latter gave her 8s., asking her if she was satisfied. The young woman did not at first return home, but she afterwards did so; but her father subsequently, when he found she was with child, turned her out of doors; she was delivered of a child on the 16th January last. From this statement of facts it will be seen, that the plaintiff's daughter, at the time of the alleged seduction, was not his servant, but she was the servant of the defendant, and that, too, at stated wages of 4s. a week. The promise was to pay her 5s. a week. [JERVIS, C. J. — The question of servitude in these actions is merely a technical one.] But the service must nevertheless be proved. This young woman was actually paid wages under a promise to do so, and therefore clearly the plaintiff's servant. [MAULE, J. — At the time she left her father's she was living with him

as his servant; she went to the defendant's at the request of his wife, but with an intention of returning home on the return of the wife from the country.] When she left the defendant's she did not go home, but went to another place. [JERVIS, C. J.—Yes, for a short time; but she eventually returned home.] [MAULE, J.—Here is a man invites the plaintiff's daughter to his house, debauches her, and she goes back to her father's; that is surely sufficient to maintain an action for loss of services such as this.] There is a case opposed to that view, *Blamire v. Haley*, 6 M. & W. 55. [JERVIS, C. J.—How can this be construed as more than going from home to visit a friend? CROWDER, J., referred to *Speight v. Oliviera*.] It should not be overlooked that the young woman had formerly been in the service of the defendant; and she was paid wages for the services rendered when there the second time. [JERVIS, C. J.—As to the question of wages, there was nothing definite shown at the trial. The letter of defendant's wife asking the young woman to go and keep house was not produced at the trial, so there is some obscurity as to the payment of wages by the defendant. Something was said about its having been agreed she should have a gratuity; and, on her return, defendant's wife gave her 8s., and asked if she were satisfied.] That is sufficient to constitute her a servant of the defendant; for whether the service be a month, a week, or day, is immaterial.

MAULE, J.—I conceive that there was here a good ground of action.

JERVIS, C. J.—In this application, the attempt to make out that there existed between the young woman and her father any other relationship than that of master and servant, as it is considered in actions of this nature, has failed; the rule therefore must be refused.

CROWDER, J.—The girl's was a mere temporary absence from home, and the service to the father was still subsisting.

Rule refused.

WEGENER v. SMITH.

Demurrage — Right to recover against Consignee of Goods.

By charter-party the shipper of goods agreed to pay demurrage. The bill of lading sent to the consignee stated the goods were to be delivered on payment of freight, and upon other conditions as per char-

ter-party. The consignee refused to pay demurrage; he afterwards received the goods on payment of freight:

Held, that the acceptance of the goods by the consignee and the abandonment of his lien by the master, was evidence to go to the jury whether the defendant was liable to pay demurrage.

THIS action, tried at Durham before CROWDER, J., was brought by the plaintiff, as master of the *Gustave Adolphe*, to recover demurrage from the defendant, who was the consignee of a bill of lading of certain timber.

Plea — Never indebted.

There was put in evidence a charter-party made between one Scheber and the plaintiff, by which it was agreed, *inter alia*, that in case of any detention of the vessel, the master should be paid £5 for every provable lay-day. The freight was payable on delivery. The bill of lading stated that the timber was to be delivered to order against the payment of the agreed freight, and according to the other conditions as per charter-party.

The plaintiff sailed from Stettin with the timber, and arrived at Sunderland on the 8th December, and applied to the defendant, to whom the timber was consigned, to have the ship delivered. There was a dispute between the plaintiff and defendant; and the latter, from the beginning, refused to pay demurrage. He showed the plaintiff the bill of lading, and demanded the timber on the payment of freight. Ultimately the timber was delivered and the freight paid; and then this action was brought for the demurrage. The jury found a verdict for the plaintiff.

Watson, Q. C., now moved for a rule calling on the plaintiff to show cause why the verdict should not be set aside, and a verdict entered for the defendant; and why there should not be a new trial on the ground of misdirection, and of the verdict being against evidence. This case ought not to have gone to the jury. The defendant from the first protested against paying demurrage; and it being a matter of fact whether the consignee of the bill of lading has undertaken to pay demurrage, there was no evidence to make him liable. The bill of lading, though referring to the charter-party, did not embody it; and the defendant is not liable for the demurrage agreed upon. In *Sanders v. Venzeller*, 4 Q. B. 200, it is held that, whether the holder of a bill of lading is liable to pay demurrage is a matter of fact. [JERVIS, C. J. — In that case it is said that the taking of the goods may be left to the jury as

evidence whether he is liable to pay demurrage.] But the defendant said from the beginning he would not pay.

MAULE, J. — He accepts the goods to which he had no right, except under the bill of lading, which, by reference to the charter-party, says he is entitled to them on payment of freight and demurrage. It is like the man ordering two embroidered coats, and saying he should not pay for them.

JERVIS, C. J. — The bill of lading refers to, and so embodies, the charter-party; and therefore the only question is, whether the defendant received the goods on the terms of the demurrage being paid. The master, by delivering them, gave up his lien to demurrage; and I think it was properly left to the jury to say whether the defendant, by receiving the goods, agreed to pay the demurrage.

Rule refused.

Court of Exchequer, Tuesday, November 7.

ORGAN V. BRODIE.

Liability of Ship-owner — Captain pledging Ship-owner's Credit for illness of Seamen.

A ship-owner is not liable, on his credit being pledged by the captain of the vessel, for necessaries supplied to the seamen during their illness occasioned from an accident on board, their assistance and continuance not being requisite in the prosecution of the voyage.

THIS was an action brought by a publican at Sheerness against the owner of a trading vessel (a collier,) for attendance and necessaries supplied to several seamen who had been on board the defendant's vessel. It appeared, that near Sheerness some accident occurred on board the vessel, and several of the seamen were thereby injured; they were, therefore, removed and taken to the house of the plaintiff, a publican at Sheerness, who provided them, as he was ordered to do by the captain, with such attendance, board, lodgings, and necessaries as were requisite; the plaintiff being told by the captain that the owner of the vessel would pay for them. Other men supplied the places on board the vessel of those who met with injury from the accident, and the vessel continued its voyage, whilst those men who met with the accident remained at the plaintiff's house for some time afterwards, and until their recovery; and this action was brought by the publican to recover from the owner the

expenses of the men. The case was tried before the Lord Chief Baron, in London, when the plaintiff was nonsuited.

Bramwell, Q. C. now moved, pursuant to leave reserved, to set aside the nonsuit and enter a verdict for the plaintiff for the amount claimed. The captain had pledged the credit of the owner for these expenses — he assured the publican, when the men were removed from the vessel to his house, the owner would pay for them; he contracted on account of the owner. [PARKE, B. — Was the vessel delayed in consequence of the absence of these men, or was their presence on board necessary before the vessel could proceed?] No; others supplied their place; the vessel went on; the men remained at the plaintiff's house some time after.

PARKE, B. — The captain had no power, under these circumstances, to pledge the credit of the owner; and the defendant is not liable for these expenses. If it had been requisite for the vessel's proceeding on her voyage that these men should have been restored, the case may have been different; but that was not so; the vessel proceeded, and the men remained. The defendant is not liable.

POLLOCK, C. B. and ALDERSON, B. concurring.

Rule refused.

Notices of New Books.

A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES, comprising a Digest of the Penal Statutes of the General Government, and of Massachusetts, New York, Pennsylvania and Virginia, with the decisions of cases arising upon those statutes and a General View of the Criminal Jurisprudence of the Common and Civil Law. By FRANCIS WHARTON, author of "Precedents of Indictments and Pleas." Third Edition. Philadelphia: Kay & Brother, Law Booksellers and Publishers. 1855.

That this work has proved valuable and acceptable to the profession, is shown by the fact that a third edition has been issued within the term of nine years. From the examination which we have been able to bestow upon it, we believe it calculated to supply the want often felt by practitioners in the criminal courts, of a convenient and compendious work of *Nisi Prius* reference.

But it is also something more than this, and it appears well adapted for a guide in the preliminary studies which are necessary for a due preparation for the trial of a cause. We are glad to see that Mr. Wharton has not restricted himself to making his book a mere index of cases of common and statute law, but that he has drawn upon the too much neglected treasures of the civil law, and upon the modern jurisprudence of the European continent. We hope to see the same method adopted in treatises on other branches of legal science.

We have some doubt of the utility, in a work intended to elucidate the general principles of the criminal law, of attempting a digest of the penal statutes of the individual States of this Union. The diversities in our criminal legislation are as various as the circumstances and character of the different States. To digest the statutes of only a part of the States, is confessedly to construct a work on an imperfect plan. To embrace the whole, would make the volume too expensive and unwieldy to be of general and familiar use. Our criminal law is essentially statutory, at least with regard to crimes above misdemeanors, and, by consequence, local; and a practitioner in New York or Massachusetts can hardly be willing, in purchasing a treatise for his practical use, to pay also for a collection of all the statute criminal law of the States. The volume before us exceeds the usual size of works of the kind. It extends to more than eleven hundred large and closely-printed pages, yet only comprises the statute law of the United States and of four of the States. When the thirty-one, or the indefinite number to which we shall hereafter attain, are included, the work will be too ponderous for ready and familiar use.

The volume before us is well provided with copious notes and references, a full and minute index, and a table of the numerous cases cited. We believe it to be a valuable addition to the resources of the profession, and as such we wish for it its merited success.

A TREATISE ON THE LAW OF HOMICIDE IN THE UNITED STATES, to which is appended a series of *Leading Cases on Homicide*, now out of print, or existing only in manuscript. By FRANCIS WHARTON. Philadelphia: Kay & Brother, Law Booksellers and Publishers. 1855.

This work is by the same author and from the same publishers as that just before noticed. It contains a compendious view of the law in the United States on the subject of Homicide, such as has not, to our knowledge, ever before been attempted. We argue well for the character of this volume, from that of the one just noticed by the same author. We are glad to find a chapter on the divisions of the crime of murder, into murder in the first and second degree — a distinction arising, we believe, in Pennsylvania by statute, from thence adopted in several other States, but unknown to the common law or to the criminal jurisprudence of Massachusetts. The table of contents, and of cases cited, and the index, appear to be well done, and the references are numerous. We welcome the work with the same commendations and good wishes that we have above bestowed on its elder brother.

Insolvents in Massachusetts.

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Commissioner.
Arlin, Stephen N.	Lowell,	Feb. 14, 1855,	Isaac S. Morse.
Arnold, Charles G.*	Boston,	" 1,	John M. Williams.
Baldwin, Jonathan	Great Barrington,	" 13,	Lorenzo H. Gamwell.
Bangs, Elbridge †	Boston,	" 16,	John P. Putnam.
Barker, Edmund P.	Boston,	" 3,	Charles Demond.
Bates, George W.	Natick,	" 20,	John W. Bacon.
Blanchard, Isaac	Florida,	" 8,	Shepherd Thayer.
Blodgett, George W.	Charlestown,	" 8,	Isaac S. Morse.
Bricher, William	Boston,	" 10,	Charles Demond.
Butters, Daniel H.	Bedford,	" 24,	Ass F. Lawrence.
Butts, James E., Jr.*	Watertown,	" 1,	John M. Williams.
Byron, George	Quincy,	" 14,	John P. Putnam.

* For Notes to the above references, see next page.

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Commissioner.
Calkins, Charles W.†	Boston,	Feb. 16,	John P. Putnam.
Cheney, John E.	Boston,	" 7,	Charles Demond.
Cleveland, Edward C.	Charlton,	" 5,	Alexander H. Bullock.
Clifford, Elizabeth M.	Newburyport,	" 6,	John G. King.
Codrinn, James	Newton,	" 5,	Isaac S. Morse.
Crowe, Wm. F.	Boston,	" 2,	John P. Putnam.
Crowell, Nathan, Jr.	Newton,	" 2,	John M. Williams.
Davis, Lewelly P.	Woburn,	" 20,	John P. Putnam.
Eaton, George A. †	Charlestown,	" 24,	Isaac Ames.
Hale, Isaac K.	Natick,	" 13,	John W. Bacon.
Harrington, George E.	Clinton,	" 19,	Alexander H. Bullock
Hartshorn, Newell ‡	Walpole,	" 21,	Charles Endicott.
Harbard, Benjamin F.	Dorchester,	" 22,	Isaac Ames.
Hill, Samuel F.	Boston,	" 27,	John M. Williams.
Hoyt, John Q. †	Charlestown,	" 24,	Isaac Ames.
Hoyt, Wm. H. †	Boston,	" 24,	Isaac Ames.
Hudson, John O.	East Bridgewater,	" 6,	Welcome Young.
King, Wm.	Adams,	" 26,	Shepherd Thayer.
Knapp, Wm F.	Northampton,	" 19,	I. F. Conkey.
Ladd, Horace W.	Springfield,	Jan. 22,	Henry Vose.
Lincoln, Lewis	Northboro',	Feb. 17,	Alexander H. Bullock.
Locke, Horace	Winchester,	" 15,	Isaac S. Morse.
Longley, Benjamin A. †	Boston,	" 12,	Charles Demond.
Longley, Isaac A. †	Boston,	" 12,	Charles Demond.
Lothrop, Barnabas	Randolph,	" 2,	Samuel B. Noyes.
Martin, George D. †	Roxbury,	" 14,	John P. Putnam.
Mason, Stephen N.	Lowell,	" 8,	Isaac S. Morse.
Melendy, John	Southbridge,	" 23,	Alexander H. Bullock.
Morey, George P. ‡	Walpole,	" 21,	Charles Endicott.
Morton, James C. **	Boston,	" 23,	Isaac Ames.
Munson, Selden J.	Springfield,	" 7,	Henry Vose.
Patch, Abraham, Jr.	Wenham,	" 19,	John G. King.
Perkins, Asa	Bridgewater,	" 26,	Welcome Young.
Peters, Thomas De Blois †	Roxbury,	" 14,	John P. Putnam.
Peysor, Samuel	Boston,	" 8,	John P. Putnam.
Phelps, George S. ††	Northampton,	" 26,	H. H. Chilson.
Peirce, Isaac	Boston,	" 27,	John M. Williams.
Pierce, John R.	Barre,	" 23,	Charles Brimblecom.
Plaisted, Daniel ††	Charlestown,	" 5,	Asa F. Lawrence.
Reed, Isaac T. †	Boston,	" 16,	John P. Putnam.
Richardson, Joseph W.	Cohasset,	" 28,	Charles Endicott.
Robbins, Louis S.	Boston,	" 24,	Isaac Ames.
Rogers, Fitz William ††	Andover,	" 5,	Asa F. Lawrence.
Rogers, Henry L.	Springfield,	Dec. 13, 1854,	Henry Vose.
Shattuck, Luther	Pepperell,	Feb. 28, 1855,	Isaac S. Morse.
Smallwood, George T. **	Boston,	" 23,	Isaac Ames.
Smith, Theophilus S.	Lowell,	" 1,	Isaac S. Morse.
Somes, R. S.	Groveland,	" 27,	John G. King.
Stearns, Charles	Littleton,	" 6,	Isaac S. Morse.
Stetson, Joshua, Jr.	Walpole,	" 20,	Francis Hilliard.
Straw, Benjamin	Lynn,	" 19,	John G. King.
Tillotson, Wm.	Northampton,	" 19,	H. H. Chilson.
Tucker, Joseph W.	Boston,	" 23,	John M. Williams.
Viles, Nathan, Jr.	Boston,	" 8,	Charles Demond.
Way, John M.	Roxbury,	" 9,	Francis Hilliard.
Webster, Levi	Chester Factories,	Dec. 9, 1854,	Henry Vose.
Wheeler, Eliash T.	Berlin,	Feb. 17, 1855,	T. G. Kent.
White, Windsor	Templeton,	" 9,	C. H. B. Snow.
Whitehouse, Moses	Charlestown,	" 5,	Isaac S. Morse.
Whitney, Rufus H.	Boston,	" 1,	John M. Williams.
Winslow, Wm.	Charlestown,	" 23,	John M. Williams.
Wiswall, Timothy	Canton,	" 10,	Charles Endicott.
Woodruff, Wm. B.	East Bridgewater,	" 26,	Welcome Young.
Wright, Enos, Jr. ††	Northampton,	" 26,	H. H. Chilson.
Zimmerman, John A.	Salem,	" 7,	John G. King.

* Arnold & Butts.

† J. Q. Hoyt & Co.

‡ B. A. & I. A. Longley.

** Smallwood & Morton.

†† Rogers & Plaisted.

† Calkins, Reed & Bangs.

‡ Firm not stated.

† Martin & Peters.

†† Wright & Phelps.

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ERRATA.

In the report of the case of *Abbott et ux. v. The Essex Company*, in the March number, p. 608, line 16, after *two*, insert *sons*.

- " 608, " 17, for *estates*, read *estate*.
- " 609, " 23, for *decided*, read *described*.
- " 611, " 13, after *decision*, insert in *Parker v. Parker*.
- " 611, " 20, for *if he*, read *for he*, and dele []
- " 612, " 4, after *estate*, insert *tail*.
- " 612, " 7, for *his*, read *this*.
- " 614, " 19, for *want*, read *event*.
- " 615, " 4, for *rule*, read *will*.
- " 615, " 35, for *he*, read *the other brother*.



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